

DOCUMENT RESUME

ED 470 556

UD 035 350

AUTHOR Entmacher, Joan
TITLE Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children. Reaching Common Ground.
INSTITUTION National Women's Law Center, Washington, DC.; Center on Fathers, Families, and Public Policy, Madison, WI.
SPONS AGENCY Ford Foundation, New York, NY.; Administration for Children and Families (DHHS), Washington, DC.; Office of Child Support Enforcement (DHHS), Washington, DC.
PUB DATE 2002-00-00
NOTE 56p.; For a related document, see ED 447 940.
AVAILABLE FROM National Women's Law Center and Center on Fathers, Families, and Public Policy, 11 Dupont Circle, Suite 800, Washington, DC 20036. Tel: 202-588-5180; Fax: 202-588-5185; Web site: <http://www.nwlc.org>.
PUB TYPE Reports - Descriptive (141)
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS *Child Support; Child Welfare; *Low Income Groups; One Parent Family; Parent Responsibility; Public Policy; Welfare Reform

ABSTRACT

The Common Ground Project brings together individuals who work with low-income mothers and fathers to develop and advance public policy recommendations on child support and interrelated welfare and family law issues that promote effective co-parenting relationships and ensure emotional and financial support for children. This report grew out of a series of meetings that explored economic issues around child support which would give more child support payments to children rather than use them to reimburse public assistance and Medicaid costs; set child support awards in a fair and realistic way; modify awards to reflect changing circumstances; manage arrears; and increase family income. Seven recommendations for improving the determination of child support obligations for low-income mothers, fathers, and children include child support policies for setting and adjusting child support obligations should be supported by federal and state policies designed to increase the income of low-income mothers, fathers, and children; Congress and states should ensure that child support awards for low-income families are set through a fair process that considers parents' actual income and circumstances; and states should develop systematic policies on the compromise of arrears owed to the state. An appendix presents participants in the Common Ground meetings. (SM)

Reaching Common Ground

Dollars and Sense:

Improving the
Determination of
Child Support
Obligations for
Low-Income
Mothers, Fathers
and Children

**NATIONAL
WOMEN'S
LAW CENTER**
EXPANDING THE POSSIBILITIES

CFPP Center on Fathers, Families, and Public Policy

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

This document has been reproduced as
received from the person or organization
originating it.

Minor changes have been made to
improve reproduction quality.

Points of view or opinions stated in this
document do not necessarily represent
official OERI position or policy.

PERMISSION TO REPRODUCE AND
DISSEMINATE THIS MATERIAL IN MICROFICHE,
AND IN ELECTRONIC MEDIA FOR ERIC
COLLECTION SUBSCRIBERS ONLY,
HAS BEEN GRANTED BY

R. Will
Center on Fathers, Families,
Public Policy
TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

2A

Reaching Common Ground

Dollars and Sense:

Improving the
Determination of
Child Support
Obligations for
Low-Income
Mothers, Fathers
and Children

**NATIONAL
WOMEN'S
LAW CENTER**
EXPANDING THE POSSIBILITIES

CFPP Center on Fathers, Families, and Public Policy

BEST COPY AVAILABLE

Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children was written by the National Women's Law Center and the Center on Fathers, Families, and Public Policy as the second report on the special concerns of low-income mothers and fathers — and public policy recommendations to address these concerns — in several areas of family law and policy. The report is based on the discussions of the participants in the Centers' collaborative Common Ground project.

The National Women's Law Center is a non-profit organization working to expand opportunities and eliminate barriers for women and their families, with a major emphasis on the areas of family economic security, education, employment and health.

The Center on Fathers, Families, and Public Policy is a non-profit organization working to improve outcomes for low-income families, especially by advancing policies to help parents, whether married or not, work together to support their children emotionally and financially.

Additional copies of this report are available at www.nwlc.org or www.cffpp.org, or from either Center.

Copyright © 2002 National Women's Law Center and Center on Fathers, Families, and Public Policy

BEST COPY AVAILABLE

ACKNOWLEDGMENTS

Several members (past and present) of the staffs of the National Women's Law Center and the Center on Fathers, Families, and Public Policy have contributed greatly to *Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children*. At the National Women's Law Center, principal report author and Common Ground project co-director Joan Entmacher and Common Ground project co-director Nancy Duff Campbell are grateful for the assistance of Jennifer Mezey and Cristina Ritchie. At the Center on Fathers, Families, and Public Policy, Common Ground project co-directors David Pate and Jacquelyn Boggess appreciate the assistance of Marguerite Roulet. Both Centers thank Michael K. Lewis, President of ADR Associates, for facilitating the discussions that led to this report.

Dollars and Sense would not have been possible without the contributions of the participants in the Common Ground discussion. Both Centers thank them for their thoughtful comments during the discussions which are the basis for this report, and their willingness to provide technical assistance, comments and advice as the report was drafted. The participants are listed in the Appendix.

Finally, both Centers are grateful to the Ford Foundation and the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, for their funding of the Common Ground project and this report. The Centers also thank funders of their related work: for the National Women's Law Center, the Cafritz Foundation, Fannie Mae Foundation, Ford Foundation, Fox/Kiser, Moriah Fund, Ms. Foundation for Women, National Association for Public Interest Law, and Rosenberg Foundation; and for the Center on Fathers, Families, and Public Policy, the Charles Stewart Mott Foundation, Ford Foundation, and Public Welfare Foundation.

The statements and views expressed in this report are solely the responsibility of the National Women's Law Center and the Center on Fathers, Families and Public Policy, and do not necessarily reflect the views or positions of the funders.

BEST COPY AVAILABLE

TABLE OF CONTENTS

I. THE COMMON GROUND PROJECT	1
II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES	2
1. Setting Child Support Awards: The Legal and Policy Context	2
a. <i>The Development of Child Support Guidelines</i>	
b. <i>Basic Models for Child Support Guidelines</i>	
c. <i>The Treatment of Low-Income Noncustodial Parents Under State Guidelines</i>	
d. <i>Imputing Income</i>	
e. <i>Medical Child Support</i>	
f. <i>Retroactive Child Support and Medicaid Debt</i>	
g. <i>When Child Support Goes to Children</i>	
2. Reaching Common Ground on Setting Child Support Awards	9
a. <i>Improving Child Support Guidelines for Low-Income Families</i>	
b. <i>Minimum and Zero Orders</i>	
c. <i>Setting Awards for Low-Income Families</i>	
d. <i>Determining Income Fairly for Low-Income Parents</i>	
e. <i>Payment in Cash or in Kind</i>	
f. <i>Securing Health Insurance at Reasonable Cost</i>	
g. <i>Minimizing Debts to the State in the Initial Award</i>	
h. <i>Reimbursement of Medicaid Birthing Costs</i>	
III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS	19
1. Review and Adjustment: The Legal and Policy Context	19
a. <i>Periodic Review and Adjustment by State Child Support Agencies</i>	
b. <i>Periodic Review and Adjustment of Medical Support</i>	
c. <i>Modification for "Substantial Change of Circumstances"</i>	
d. <i>Modifying Awards for Incarcerated Noncustodial Parents</i>	
2. Reaching Common Ground on Improvements to the Review and Adjustment Process	23
a. <i>Helping Parents Decide Whether to Seek a Review and Adjustment</i>	
b. <i>Increasing Access to a Timely Review and Adjustment</i>	
c. <i>Improving the Periodic Review and Adjustment Process</i>	
d. <i>Making Adjustments When Adjustments Are Due</i>	
e. <i>Adjusting Medical Support When Appropriate</i>	
f. <i>Improving Access to Modifications for a Substantial Change in Circumstances</i>	
g. <i>Modifying Awards for Incarcerated Parents</i>	

BEST COPY AVAILABLE

TABLE OF CONTENTS

IV. MANAGING ARREARS	29
1. Arrears: The Legal and Policy Context	29
2. Reaching Common Ground on Managing Arrears	30
a. Preventing the Accumulation of Arrears	
b. Crediting In-Kind Support Against Arrears	
c. Compromising Arrears that Have Accrued	
V. RECOMMENDATIONS FOR IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN	34
ENDNOTES	38
APPENDIX: PARTICIPANTS IN THE COMMON GROUND MEETINGS ON DETERMINING CHILD SUPPORT OBLIGATIONS	48

BEST COPY AVAILABLE

I. THE COMMON GROUND PROJECT

The Common Ground project is a collaboration of the National Women's Law Center (NWLC) and the Center on Fathers, Families and Public Policy (CFFPP). The goal of the project is to bring together individuals who work with low-income mothers and fathers to develop and advance public policy recommendations on child support and interrelated welfare and family law issues that promote effective co-parenting relationships and ensure emotional and financial support for children.

Although low-income mothers and fathers¹ often share a desire to support their children, public policies often do not recognize their needs or the complexity of their relationships and family structures, and may end up pitting parents against each other rather than helping them work together to provide for their children. Moreover, the public discussion of these issues tends to highlight the points of disagreement and conflict between low-income mothers and fathers, rather than their common interests. Similarly, advocates working on these issues tend to work either on behalf of low-income mothers or fathers. While in some instances these groups support the same policies, they are often — just like low-income mothers and fathers — confined in the public policy arena to staking out adversarial positions on either side of an issue. The Common Ground project provides a rare opportunity for advocates, practitioners, and researchers who work primarily with low-income mothers, and those who work primarily with low-income fathers, to come together, explain their concerns, reach a better understanding of the issues, and, in many instances, forge solutions that meet the needs of all family members. The goal is to achieve policies that reflect the perspectives — and the areas of common ground — of both mothers and fathers in these fragile families, which should improve outcomes for their families.

The first Common Ground meeting focused on paternity issues because the establishment of paternity is a "gateway" to other child support and family law issues. The first report, *Family Ties: Improving Paternity Establishment Practices and Procedures*

for Low-Income Mothers, Fathers and Children,² provides insights into the hopes and concerns that low-income mothers and fathers have about paternity establishment. *Family Ties* makes a series of recommendations to improve the paternity establishment process. However, it also recognizes that it is impossible to discuss reforms to paternity establishment without considering its economic, social, and other legal consequences, and recommends that "the policies associated with paternity establishment should increase the economic and emotional support available to children of low-income parents."³

This second Common Ground report grew out of a series of meetings that explored the economic issues around child support in greater depth: policies that would give more child support payments to children, rather than use them to reimburse public assistance and Medicaid costs; set child support awards in a fair and realistic way; modify awards to reflect changing circumstances; manage arrears; and increase family income. The diverse and distinguished public policy advocates, practitioners, and researchers who participated in the meetings are listed in the Appendix.

NWLC and CFFPP have prepared this report in consultation with the participants at the meetings on economic issues, but are solely responsible for the final product. The goals are to capture the discussion at the meetings and to present the recommendations that are supported by a majority of participants. Despite the tensions around these economic issues, there are several areas of common ground. In the areas in which there is no consensus, the effort is to capture the arguments on both sides of the issue. Both by describing and explaining the particular concerns of low-income mothers and fathers, and making concrete recommendations to address these concerns, when possible, this report is intended to contribute to on-going efforts to improve the policies that can make such a difference in the lives of these mothers and fathers, and the children for whom they are responsible.

The goal is to achieve public policies that promote effective co-parenting relationships for low-income mothers and fathers and ensure emotional and financial support for children.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

When both parents are poor, small differences in the amount of child support paid — and received — may make the difference, in either household, between having enough to eat or going hungry.

When there is not enough income to go around, making decisions about how to divide it is inherently difficult. When both parents are poor, small differences in the amount of child support paid — and received, when children receive the payments — can matter deeply. They may make the difference, in either household, between having enough to eat or going hungry that week, between making that month's rent payment or being evicted. Yet when both parents are poor, despite the struggles and hardships of both parents, child support payments still may fall short of meeting children's needs. Setting support obligations at a level that far exceeds a low-income parent's ability to pay may do nothing to increase the amount of child support that children receive, and may even decrease it. And, if the children are current or former recipients of public assistance, the child support payments made on their behalf may go to the state and federal government to reimburse public assistance costs, rather than to the family.

The size of the initial child support obligation is a function of several different policies: the guidelines, or formula, the state uses to calculate child support; the way the state determines the amount of income to which the guidelines should be applied; what contributions count toward satisfaction of the obligation; how the responsibility to provide medical support is addressed; and whether, in addition to a prospective award for cash and medical child support, the initial award includes a retroactive obligation to reimburse birthing costs, past welfare assistance, or child support for the period before the order was established. The sections that follow provide some background information on these issues, then summarize the discussions of the participants at the Common Ground meetings as they worked to develop recommendations on these issues.

I. Setting Child Support Awards: The Legal and Policy Context

a. The Development of Child Support Guidelines

Twenty-five years ago, child support issues were almost entirely matters of state law.⁴ However, in 1975, with the primary goal of increasing child support collections to reimburse federal and state welfare costs, the federal government assumed a more active role by establishing the federal/state child support enforcement program. As a condition of receiving federal funding for their welfare programs (then Aid to Families with Dependent Children, or AFDC, now Temporary Assistance for Needy Families, or TANF), and to receive federal matching funds for child support enforcement, states must comply with federal child support enforcement requirements. Since 1975, the mission of the program has expanded; Congress has provided additional tools and incentives to states to improve services to families not receiving public assistance, who now represent over 80% of the program's caseload.⁵ And, with numerous amendments to the law since 1975, Congress has changed the way states establish paternity, enforce child support, and determine the amount of a child support award.⁶

Historically, the amount of a child support award was at the discretion of individual judges. Awards varied dramatically from judge to judge,⁷ and generally were inadequate. On average, the support paid to custodial mothers was significantly less than half of what a typical two-parent household would spend on children.⁸ One study found that fathers' child support awards often amounted to less than their car payments.⁹ However, by the early 1980s, a few states had begun using numerical guidelines to set child support awards. Studies showed that the use of such guidelines helped to make child support awards more consistent and adequate.¹⁰

In 1984, Congress required that all states develop child support guidelines — numerical formulas for the calculation of child support awards — for state

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

judges to consider in setting child support awards.¹¹ In 1988, Congress went further and required that state child support guidelines operate as a rebuttable presumption in any judicial or administrative proceeding for the award of child support.¹² In addition, the 1988 amendments required that states review their guidelines every four years, to ensure that their application results in appropriate award amounts.¹³ However, states were given great discretion in developing the content of their guidelines.¹⁴

b. Basic Models for Child Support Guidelines

States have adopted different types of guidelines to determine award amounts.¹⁵ The simplest model is the "percentage-of-income" guideline used by about 15 states.¹⁶ Under this model, a percentage of the noncustodial parent's income is awarded as child support, based on estimates of the percentage of income devoted to expenditures on children in two-parent families. Percentages increase for additional children (for example, 17% of gross income for one child, 25% for two, 29% for three). The custodial parent is assumed to spend her proportional share of expenses directly on the children. Because percentage-of-income guidelines assume that the percentage of parental income devoted to expenditures on children remains constant across a wide range of incomes, it is not necessary to include the custodial parent's income in the calculation.¹⁷

Percentage-of-income guidelines address low-income obligors in different ways. Some apply the same flat percentages to all levels of income. Others apply a lower percentage to low levels of income, or below a certain threshold set a minimum order or leave the award to judicial discretion.

"Income-shares" guidelines are used by a majority of states (31).¹⁸ Under this model, the parents' incomes are combined, the amount of child support corresponding to that level of combined income is determined from a table, and the basic support obligation is prorated between the parents based upon the ratio of their incomes. Other costs, such as child

care, may be prorated and added to the basic support obligation.

The table that determines the amount of support is based on estimates of the percentage of income devoted to expenditures on children in two-parent families with similar income. However, unlike the percentage-of-income guidelines, income-shares guidelines assume that the percentage of parental income spent on children decreases, rather than remains constant, as total income rises, beginning at fairly low levels of parental income. Thus, under income-shares guidelines, lower-income obligors are required to pay a higher percentage of their income as child support than higher-income obligors.¹⁹

Many income-shares guidelines have a low-income threshold below which the guidelines do not apply. However, when the threshold is based on the parents' combined income, it may have peculiar effects. For example, if the threshold is \$700 per month in combined income, when the noncustodial parent earns \$500 and the custodial parent earns \$150, only a minimum amount of support may be due. However, a modest increase in the custodial parent's earnings to \$300 per month, because it increases the combined income above the threshold, may substantially increase the support obligation of a noncustodial parent whose income is unchanged. Similarly, a decline in the custodial parent's income that lowers combined income below the threshold may greatly reduce the support obligation of a noncustodial parent, even though his income is unchanged and the custodial parent's ability to provide support has decreased.

The "Delaware" or "Melson" model guidelines used by a few states provide for a self-support reserve for both parents, then allocate parental income above that reserve to meet their children's minimum needs, and finally, if there is additional income available, add a percentage of that income to the award.

Some jurisdictions, such as Massachusetts and the District of Columbia, use hybrid models. They use a varying percentage of noncustodial parent income that increases as noncustodial parent income in-

Federal law requires all states to have child support guidelines that operate as a rebuttable presumption.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

State policies and practices vary greatly in the way they address the child support obligations of low-income parents.

creases, so that the guidelines are progressive rather than regressive in effect. Once the income of the custodial parent and children has increased above a certain threshold net of child care expenses, it may reduce the amount of the noncustodial parent's child support obligation.

c. The Treatment of Low-Income Noncustodial Parents Under State Guidelines

State policies and practices concerning the determination of the child support obligations of low-income noncustodial parents vary widely. According to a survey of state policies on this issue by the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services, 30 states specify an income threshold below which orders are established differently than under the state's regular guideline principles.²⁰ Threshold levels range from \$400/month, to the federal poverty level (\$716/month for one person in 2001), to \$1,000/month.²¹

The OIG survey also found that states use their thresholds in different ways. In about eight states, the setting of awards for obligors with income below the threshold is left to the discretion of the decision-maker (some states without defined thresholds also leave the setting of awards for "low-income" obligors to the discretion of the decision-maker).²² Over half the states set minimum awards for low-income obligors (some of these states apply the minimum below a specific income threshold, others do not use an income threshold).²³ Minimum awards range from \$20/month (or a range of \$20-\$50/month) to over \$100/month, with \$50/month being the most common minimum award.²⁴

Several states describe their minimum awards as mandatory. This is an apparent violation of federal law which requires that guidelines operate as a rebuttable presumption. The federal Office of Child Support Enforcement (OCSE) has advised states that guidelines that must be followed without the possibility of rebuttal do not comply with federal law;²⁵ and, specifically, that "[w]hile states are allowed to

use minimum awards, the minimum amount must be rebuttable."²⁶

In addition to differences between states in the way child support guidelines address low-income noncustodial parents, there are significant variations within states in the way guidelines are applied, especially to low-income noncustodial parents. A multi-state study that analyzed how decision-makers within states are applying child support guidelines found that deviations from guidelines are more extreme — in both directions — when obligors are low-income.²⁷

d. Imputing Income

All child support guidelines in the United States use parental income as a key factor in calculating support obligations.²⁸ For individuals whose income is derived from stable, reported employment, obtaining evidence of actual earnings and determining the income to be used in the child support calculation is fairly straightforward.²⁹ However, stable jobs are not common among low-income mothers³⁰ or fathers.³¹ When information about actual income is unknown or believed to be unreliable, or when a decision-maker believes an individual's low income is the result of voluntary unemployment or underemployment, a decision-maker may attribute income to the parent, and base the guideline calculation on that imputed income. (Technically, using indirect information to estimate the actual income of someone who is working off the books is not income imputation. In practice, however, because indirect information is often limited, the practices are hard to distinguish, and judicial decisions often fail to do so.³²)

Income may be imputed to custodial parents as well as noncustodial parents in states that use guidelines that consider the income of both parents in setting awards. Some guidelines specifically provide that income shall not be imputed to a parent who is providing care to a child of the parties below a certain age (ages range from under six months to under six years); in other states, decision-makers determine whether a parent who stays at home or works in the

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

paid labor force part-time to provide care for a child should be considered voluntarily unemployed or underemployed and should have income imputed.³³ A few states consider the costs of child care in deciding whether income should be imputed to a custodial parent.³⁴ Ironically, if the costs of child care were imputed along with income to a custodial parent who was a full-time or part-time caregiver, and prorated between the parents as many guidelines provide, the total child support obligation of the noncustodial parent would likely increase rather than decrease. This is because the noncustodial parent's share of the additional (imputed) child care costs would more than offset any reduction in the basic child support obligation due to an increase in the custodial parent's (imputed) earnings, assuming typical child care costs and typical earnings for the custodial parent.³⁵

The OIG survey of state policies on setting awards for low-income noncustodial parents found that every state except Connecticut, Mississippi, and the District of Columbia allows for the imputation of income.³⁶ Policies vary on the circumstances in which imputation will be allowed and the factors considered in determining the amount to be imputed. Thirty states impute income if the noncustodial parent fails to provide relevant information or is currently unemployed or underemployed.³⁷ Five states impute income only if the noncustodial parent fails to provide relevant information, 13 states impute income only if the noncustodial parent is unemployed or underemployed.³⁸ However, several states prohibit the imputation of income to parents receiving means-tested public assistance, unless there is a determination that the failure to impute such income would be unjust or inappropriate.³⁹

States determine the amount of income to be imputed in various ways, and may use more than one method. Thirty-five states impute income on the assumption that noncustodial parents should be able to work 40 hours per week, full year, at minimum wage.⁴⁰ This is the most frequently used method.⁴¹ Fifteen states consider the area wage rate, and ten

states consider the area employment rate.⁴² When some information about the noncustodial parent is available, more than 30 states also base imputed income on the noncustodial parent's work history, skills, or experience.⁴³

The rationale for imputing income is to ensure that a parent cannot avoid the establishment of a child support obligation by failing to provide information about income or voluntarily reducing it. However, establishing an obligation based on imputed income does not ensure that payment will be made. In addition to surveying state policies concerning the setting of awards for low-income noncustodial parents, the OIG conducted a more in-depth analysis in ten states of how those policies affected the actual payment of child support.⁴⁴ It found that cases in which income had been imputed were four times more likely to have generated no payments during a 32-month period than cases in which income had not been imputed (44% to 11%).⁴⁵ The OIG noted that this finding did not show that imputation of income was the cause of nonpayment, noncustodial parents who fail to provide information or are unemployed may be less likely to pay support than those who appear in court or are employed.⁴⁶ However, the finding does indicate that imputing income is not a very effective method of getting them to pay. Some states that have analyzed their hard-to-collect cases have concluded that the combination of frequently setting awards by default and imputing a high level of income to absent obligors is an important factor in increasing the amount of uncollectible debt.⁴⁷

While using imputed income to set support awards may not be an effective way to increase collections, determining actual income for individuals who work in unstable, temporary or seasonal jobs, are self-employed, or for whom income is unreported, is also difficult. The wage information available to state child support enforcement agencies through their automated systems may be incomplete. For example, employers subject to the state Unemployment Insurance (UI) tax are required to re-

Basing awards on imputed income is not an effective way to increase collections, but it is difficult to determine actual income for individuals who work in unstable jobs or whose income is not reported.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

Current medical support policies are not well-suited to the realities of today's health insurance market and the circumstances of many low- and moderate-income parents.

port employee earnings to the state UI agency. However, even for covered employment within the state, researchers note that UI administrative records are likely to be incomplete, since employers have incentives to underreport employment and earnings.⁴⁸ The types of employers most likely to underreport are small firms with high turnover rates, which also are the most likely to employ low-skilled, low-income workers.⁴⁹ In addition, state UI systems do not include information about self-employed individuals, most independent contractors, federal and military employees, and individuals working out of state.⁵⁰ Although the development of the National Directory of New Hires has made more information about out-of-state earnings available to state child support agencies, in states where automated systems have not been fully implemented, information through this national automated interface may not always be readily available to caseworkers.⁵¹ Moreover, the extent to which states try to develop possible sources of information about income beyond what the automated system supplies, especially in default cases, differs.⁵²

For some low-income parents, work in the informal economy is an important source of additional income. For example, based on interviews with unmarried fathers in several cities, the Fragile Families and Child Wellbeing Study found that almost three in ten unmarried fathers (28%) participated in the informal economy, including unreported earnings from self-employment, under-the-table work for cash, "hustling," etc.⁵³ For these fathers, such work raised their earnings by \$3,293 a year on average or 23%.⁵⁴ Very few unmarried fathers in the Fragile Families study (1.3%) worked solely in the informal economy; about 2% reported no earnings.⁵⁵

Imputing income based on full-time, full-year minimum wage work — \$10,300 per year based on 40 hours per week, 50 weeks per year, at \$5.15 per hour — underestimates the earnings of some unmarried fathers, and overestimates the earnings of others. Average earnings of unmarried fathers in the Fragile Families study were \$18,554 in 1999 for fathers with regular-sector employment only, and \$19,416 for

those with earnings from regular-sector employment and the informal economy.⁵⁶ However, 40% of unmarried fathers in the sample had regular-sector earnings below \$9,000, and 15.5% had regular-sector earnings between \$9,000 and \$12,999.⁵⁷ A study of fathers of children receiving assistance under Wisconsin's Temporary Assistance for Needy Families program found that the average amount for those with earnings (based on earnings as reported to the researchers, which were higher than earnings reflected in UI records) was \$14,600; however, 22% of the sample reported no earnings to the researchers, 38% had no earnings reflected in state UI records.⁵⁸

e. Medical Child Support

Federal law requires state child support agencies to petition for the inclusion of medical support as part of a child support order whenever health care coverage for the child is available to the noncustodial parent at "reasonable cost."⁵⁹ The relevant regulation defines health care coverage to be available at reasonable cost if it is employment-related or available through other group health insurance.⁶⁰ State child support guidelines generally address the cost of health insurance in two ways: by deducting the cost of the insurance from the income of the paying parent or by adding the cost to the child support award (in states using income-shares or Delaware-Melson guidelines, the cost is prorated between the parents and, if the obligor provides the insurance, the cost is deducted from child support obligation).⁶¹

Current child support rules and practices are in many ways not well-suited to the realities of today's health insurance market and the circumstances of many low- and moderate-income workers, as the Medical Child Support Working Group — created by Congress through the Child Support Performance and Incentive Act of 1998 — recognized as it developed recommendations to the Secretaries of Health and Human Services and Labor on ways to improve medical child support enforcement.⁶² Coverage through employment or a group plan is not necessarily affordable; the cost of health insurance has

risen dramatically since the regulation defining "reasonable cost" was adopted, as has the percentage of the premium employees are required to contribute.⁶³ Many employers require employees to pay for more than a third of the cost of family coverage.⁶⁴ In addition, an increasing number of health plans provide access to services only in a geographically limited area.⁶⁵ Enrolling a child in the noncustodial parent's health plan will not provide the child with access to health care if the child lives outside the plan's service area. But some child support agencies will only pursue health care coverage through the noncustodial parent, without regard to the accessibility of services for the child. Finally, even though the child may be receiving no benefit from the insurance coverage, under many states' child support guidelines the cost of the premium will reduce the monetary child support owed to the child and custodial parent.

Although affordable, accessible private health insurance coverage may be less available to the children of low- and moderate-income parents, options for publicly subsidized coverage have expanded. With funding from the federal government, all states have developed State Children's Health Insurance Programs (SCHIP) to expand children's access to health insurance coverage; however, many eligible children are still not enrolled in SCHIP. Child support agencies could play a much more significant role in enrolling uninsured children in these programs. A study of this issue by the OIG found, for example, that by improving coordination among the state child support, SCHIP, and Medicaid agencies, Connecticut could have enrolled over 13,000 additional uninsured children in the SCHIP program between March 2000 through February 2001, reaching 95% of its enrollment target instead of just 36%.⁶⁶

f. Retroactive Child Support and Medicaid Debt

An initial child support order may go beyond a prospective award of monetary child support and health insurance coverage. It also may include an order for payment of retroactive child support to the

state as reimbursement for public assistance provided to the children, and an order for reimbursement of Medicaid costs related to pregnancy and childbirth. Thus, even before the first support payment under the order comes due, an obligor can find himself owing large debts to the state.

The OIG survey on setting awards for low-income noncustodial parents found that the policies of 46 states authorize orders for the payment of retroactive support to the state as reimbursement for public assistance for periods prior to the establishment of the order.⁶⁷ States vary in how far back they may go in assessing this retroactive support; some states are restricted to a limited number of years, others can impose a support obligation back to the birth of the child.⁶⁸

The way the retroactive support order is calculated also affects the size of the total retroactive obligation. The congressional requirement that states use child support guidelines in *all* cases means that the amount of retroactive support owed to the state as reimbursement for public assistance must be calculated under the state's income-based child support guidelines, not based on the amount of public assistance paid.⁶⁹ However, older arrears may be based on the amount of public assistance paid;⁷⁰ it was not until 1993 that the federal Office of Child Support issued formal guidance to the states clarifying that this is impermissible.⁷¹ Even now, decision-makers can reach a similar result by "imputing" to the noncustodial parent sufficient income to pay an award equal to the public assistance grant.⁷²

As with income imputation, the reasons for imposing a retroactive support obligation are to recognize and enforce the responsibility of both parents to provide support and to remove incentives for obligors to evade the child support system. However, there is no evidence that adding an order for payment of retroactive support to the state increases the likelihood that support will be paid.

An OIG study in ten states of how policies concerning the setting of awards for low-income obligors were applied, and the relationship of those policies

By coordinating with Medicaid and SCHIP agencies, child support agencies could help uninsured children obtain health care coverage.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*Ordering payment
of retroactive
support to the state
does not increase
child support
compliance, and the
longer the period of
retroactivity, the less
likely the parent is
to pay any support.*

to actual collections, found that ordering payment of retroactive support to the state is not an effective method to secure compliance with child support orders.⁷³ Indeed, the longer the period of retroactivity, the less likely the parent is to pay any support.⁷⁴ This correlation does not establish that retroactive support awards cause poor compliance; the same factors that lead to retroactive orders, such as unstable income and living arrangements, are associated with poor compliance. However, a later study by the OIG does suggest that *not* including an order for payment of retroactive support to the state can improve child support compliance by poor noncustodial parents, at least when the monthly child support obligation is low (less than 15% of income).⁷⁵ That study found that when a noncustodial parent had reported earnings below the poverty line, no increase in income over the study period, and an order for payment of retroactive support to the state was added to a low order, predicted compliance was 19%.⁷⁶ For poor noncustodial parents with no increase in income over the study period, a low order and no order for payment of retroactive support to the state, compliance was higher — 29%.⁷⁷ Increases in earnings were the most important factor in improved compliance, but the presence of a retroactive support award still had a negative effect. Compliance by low-income noncustodial parents who increased earnings and had an order for payment of retroactive support to the state was 44%; compliance by low-income noncustodial parents who increased earnings and had no such order for retroactive support was 54%.⁷⁸

A study in Colorado did not find any difference in compliance rates for cases that were randomly assigned to two groups — one in which an order for payment of retroactive support to the state was added, one without such an order.⁷⁹ Researchers noted, however, that the group that was not ordered to pay such retroactive support was unaware they were receiving favorable treatment, and many of the obligors did not have enough income to pay their monthly orders.⁸⁰ If monthly awards by themselves greatly exceed the ability of a low-income parent to

pay, the Colorado study suggests that adding even more debt may not make much of a difference in payments one way or the other. But if monthly awards are reasonable, keeping them from becoming unreasonable by adding an order for payment of retroactive support to the state may help improve compliance.

For most low-income obligors with cases in the state child support system, the only retroactive support they are likely to be ordered to pay is support owed to the state as reimbursement for public assistance provided before a child support order was sought.⁸¹ In many states, custodial parents may only seek prospective child support. Even in states that allow custodial parents to seek retroactive child support, the state's ability to seek retroactive support as reimbursement for welfare costs may exceed that of custodial parents. For example, states may be able to go back further in time in seeking retroactive support than custodial parents may.⁸² And custodial parents — but not states — may be barred from receiving retroactive support because of delays in seeking a child support order, or for other equitable reasons.⁸³

In addition to ordering payment of retroactive child support to the state, initial child support orders may include a provision that the father reimburse Medicaid for the costs related to pregnancy and childbirth. Most states (39) authorize the collection of Medicaid birthing costs; however, actual practice varies among and even within states.⁸⁴ The OIG study of how ten states applied their policies concerning setting obligations for low-income obligors found that six of the ten states had a policy of collecting for Medicaid birth-related costs, but only two reported they did so in practice.⁸⁵ In Wisconsin, one of the states that routinely assesses Medicaid birthing costs, the child support agency will assess and try to collect such costs even when there is no active child support order because the parents are married or cohabiting.⁸⁶ States estimated that when such costs are included, a typical uncomplicated birth adds about

\$3,100 to the child support obligation while a Caesarean delivery adds \$6,700.⁸⁷

g. When Child Support Goes to Children

As a condition of receiving TANF, families must sign over to the state their rights to child support as reimbursement to the federal and state governments for public assistance provided to the family.⁸⁸ Under the old AFDC program, families also were required to assign their rights to child support to the state; however, in 1984, Congress required states to give families some of the child support collected while they were receiving welfare. States were required to pass through to families the first \$50 of child support collected each month and to disregard that amount when calculating the family's AFDC benefit,⁸⁹ the rest of the support collected was retained by the state and federal governments as reimbursement for public assistance. This mandatory \$50 pass-through and disregard was eliminated by Congress in 1996, leaving states free to set their own policies.⁹⁰ Most states eliminated the pass-through and disregard;⁹¹ thus, in a majority of states *none* of the child support paid by noncustodial parents, many of whom are low-income themselves, goes to the children while families are receiving TANF. Cases involving current TANF recipients represent 19% of the caseload of the child support program.⁹²

After families leave TANF, they are entitled to receive all current support payments made on their behalf.⁹³ In general, former TANF recipients also have the right to have their claims to past-due child support paid ahead of the government's, but there are several exceptions (for example, when past-due child support is collected by intercepting the noncustodial parent's federal tax refund, the money will go to repay government arrears before the family's).⁹⁴ Overall, the various exceptions to "family first" child support distribution mean that families that have left welfare get to keep only half of the child support arrearages collected.⁹⁵ Cases involving former TANF or AFDC recipients represent 46% of the caseload of the child support program.⁹⁶ Families served by the

public child support program who never received TANF or AFDC are entitled to receive all child support collected on their behalf.⁹⁷

Research demonstrates the multiple benefits of giving child support to children rather than to the state. Wisconsin undertook a unique experiment as part of its public assistance program. Families receiving TANF benefits receive all of the child support paid on their behalf, and those payments are disregarded in calculating their TANF benefits. Comparing the families who received a full pass-through and disregard of child support with the control group of families who received just the \$50 pass-through and disregard, researchers found that when all child support payments go to benefit their children, paternity is more likely to be established,⁹⁸ support is more likely to be paid, and in higher amounts,⁹⁹ and there is little if any overall increase in government cost.¹⁰⁰ Wisconsin researchers also found some evidence of improved family functioning: increased paternal contact,¹⁰¹ reduced levels of serious conflict between parents,¹⁰² and improved children's educational outcomes.¹⁰³

Other research has found that in general, child support contributes substantially to family income and child well-being, when families receive it. For all poor families who receive child support, it provides over a quarter of total income; and for poor children not on welfare, whose parents may keep all current support collected, child support provides, on average, 35% of family income — when families receive it.¹⁰⁴ Receipt of child support reduces reliance on public assistance, by helping families leave and avoid a return to welfare.¹⁰⁵ Effective child support enforcement also is linked to reductions in divorce and non-marital birth rates,¹⁰⁶ and to increases in children's educational attainment.¹⁰⁷

2. Reaching Common Ground on Setting Support Awards

As Common Ground participants began their discussions of setting support awards, they emphasized that their comments and recommendations on these

When support payments go to children, rather than to reimburse the government for welfare costs, paternity is more likely to be established, and support is more likely to be paid, and in higher amounts.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

*When both parents
have very limited
resources, states
should supplement
child support
policies with policies
to help increase
the income of
both households.*

issues should be viewed in the context of other needed policy changes.

First, in making recommendations about the size of the child support obligations of low-income parents, participants emphasized, as they had in discussions about improving paternity establishment, the importance of changing public policies to give child support to children to increase their well-being, rather than to the government as reimbursement for public assistance.¹⁰⁸ Participants observed that it is hard to tell poor noncustodial parents who cannot meet their own basic needs that, as responsible parents, they must pay formal child support when those payments go to the state and do not directly benefit their children. And it is hard to see some of the poorest children and custodial parents — current and former TANF recipients — deprived of the benefits of child support.

Second, participants highlighted the importance of setting awards through a fair process, whatever the substantive standards are. Both parents need to receive notice of the proceedings at which awards will be set, information about how guidelines work, and the opportunity to participate and provide information about their income and circumstances. Participants also urged that there be broader public education about the responsibilities of parenthood, financial and emotional, to avoid the shock that many now experience when they first encounter the child support system.

Third, participants noted that concerns about how initial awards are set intensify when parents fear that they will have to live with the consequences of an award that is too low or too high for years to come. Participants emphasized the importance of improving procedures for modifying awards, in addition to improving the way initial awards are set (see Chapter III, *infra*), and noted that improvements in these areas can reduce the build-up of arrears (see Chapter IV, *infra*).

Finally, participants stressed that when both parents have very limited resources, policies concerning the transfer of child support income must be supple-

mented by policies that increase the income and resources of both parents to ensure children an adequate standard of living. Participants emphasized that services to help mothers and fathers increase their income need to be improved. Most TANF programs serving custodial mothers emphasize caseload reduction and "work first" approaches rather than the mix of education, training and employment services that could help parents obtain jobs that will enable them to support their children.¹⁰⁹ The number of fatherhood programs has expanded greatly in recent years, including small community-based programs, state and local programs using welfare-to-work funds, and larger national initiatives such as the Responsible Fatherhood demonstration of the federal Office of Child Support Enforcement and the multi-state Partners for Fragile Families demonstration. However, many poor fathers are not receiving services, and additional research is needed to improve strategies for reaching and helping them.¹¹⁰ Programs for child support assurance and incentive payments could boost low or irregular child support payments into a more adequate and stable source of family income;¹¹¹ participants urged the development of programs that would test these promising approaches.

a. Improving Child Support Guidelines for Low-Income Families

Common Ground participants generally thought that states should develop presumptive guidelines that apply at all income levels, rather than leave the treatment of low-income families entirely to judicial discretion. Several participants noted that Congress mandated the development and use of guidelines partly in response to the capricious way in which orders had been set before guidelines, and that both research and their own experiences have confirmed that there still are substantial disparities in the way low-income obligors are treated by decision-makers.

Common Ground participants struggled to develop recommendations for setting awards for the poorest obligors. A number of participants thought that guidelines must recognize that unless noncusto-

dial parents have enough income to support themselves, they cannot be expected to pay support at more than a minimum level, if that. They emphasized that while parents have a responsibility to provide for their children, the well-being of children is also a social responsibility. When parents — custodial or noncustodial — lack the income to support their children, society must help them increase their capacity to provide for their children and, in the meantime, ensure that the children are adequately provided for.

Other participants shared these goals, but noted that in many states, only minimal assistance is available for custodial parents and children. The TANF grant in most states provides a mother and children with income of less than half the federal poverty level.¹¹² Failure to comply with any of a number of strict requirements can lead to the cutoff of assistance to the entire family.¹¹³ Participants noted that custodial parents, however poor, share what little they have with the children living with them; they have no "self-support reserve." In the absence of adequate policies to support custodial parents and children, these participants thought that exempting poor noncustodial parents from paying child support simply shifted more of the burden to poor custodial parents. Some participants thought that guidelines should ensure children a standard of living at least equal to that of the noncustodial parent who, with a poverty-level income, might be better off than the children. However, all participants were frustrated by a debate about whether the standards of living in both households should be equalized at a level below poverty.

Participants moved closer to common ground as they approached the issues pragmatically. Whatever philosophical statement they thought the guidelines should make about the obligations of each parent and society for the support of children, they recognized that setting awards for low-income noncustodial parents at an unrealistic level is unlikely to produce much additional income, and could be counterproductive. Research based on large national

data sets shows that in general, child support enforcement does not discourage men who owe support from working.¹¹⁴ However, researchers note that the low-income, noncustodial fathers who are missing from these national data sets may be more likely to respond to child support enforcement by working less or entering the underground economy.¹¹⁵ And the experience of some Common Ground participants with very low-income noncustodial parents who have both unstable jobs and unstable living situations is that setting child support awards too high can drive these parents away from the formal child support system and from the formal economy. While recognizing that research is inconclusive,¹¹⁶ these participants thought that setting awards for low-income fathers at a more manageable level would be unlikely to decrease, and might even increase, payments to children.

b. Minimum and Zero Orders

Recognizing the harsh realities confronting poor fathers and mothers, participants discussed appropriate awards for the poorest obligors: those with incomes under 50% of the federal poverty level. Despite the low income level, many participants felt that, except in cases in which noncustodial parents are poor and clearly unable to work — for example, incarcerated, disabled or institutionalized — there should be a low presumptive award, but not zero. They emphasized the difference that even small amounts of child support can make, when the payments go to children. They also saw the establishment of some monetary obligation as an affirmation that noncustodial parents, however poor, must find a way to provide economic support to their children just as custodial parents, however poor, must provide economic support. In addition, participants noted that having an order with an amount in the system increases the likelihood that the case will be tracked and the order modified if income changes. Finally, having the guidelines establish presumptive minimum orders could protect the poorest obligors, if decision-makers set awards at the minimum level

Setting awards for low-income noncustodial parents at a realistic level is unlikely to decrease, and might even increase, payments to children.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

Consideration of minimum or zero orders should take into account the difficulty of modifying an award once it has been set.

instead of basing them on unrealistically high levels of imputed income. (See discussion of imputed income, *infra*.)

Other participants argued that setting awards presumptively at zero when obligors are extremely poor is important both as a matter of principle and for practical reasons. Some of these participants argued that zero orders acknowledge that some parents cannot provide support to their children without some assistance themselves, and underscore the need to increase the commitment of public resources to support poor individuals and families. Others emphasized that minimum orders are dangerous in practice, because some noncustodial parents — individuals who are homeless, with incomes well below the poverty level — will be unable to pay even the minimum amounts ordered. Participants who work with low-income fathers emphasized the very real risk of incarceration for failure to pay child support.¹¹⁷

Concerns on both sides of the debate about minimum or zero orders were heightened by participants' awareness of the difficulty of modifying an award once it has been set. Under current law, parents are assured of an opportunity to seek a review of an order only once every three years (see Chapter III, *infra*). Research shows that over a three-year period, the incomes of the poorest noncustodial parents tend to increase; however, many remain poor and a few have no reported earnings throughout.¹¹⁸ Rather than having to choose between an unvarying zero or an unvarying minimum award, participants wished for a system where awards would reflect changes in income and efforts would be made to help noncustodial and custodial parents increase their earning capacity.

After much discussion, a majority of participants agreed that, in acknowledgment of the burdens placed on custodial parents, guidelines should provide that noncustodial parents with incomes below 50% of the federal poverty level receive a minimum order in the amount of \$20–50 per month. Participants agreed that guidelines should provide that set-

ting a zero order would be appropriate in some types of cases; for example, poor incarcerated or institutionalized noncustodial parents. And in all cases, as required by federal law, a minimum amount in the guidelines would operate as a presumptive amount, not a mandate.

c. Setting Awards for Low-Income Families

Moving slightly up the income scale, from the very poor to the merely low-income, participants continued to struggle to develop the principles that should govern the division of income between hard-pressed households. Only a few of the participants had worked on the development of child support guidelines, a complex exercise that has challenged policy makers and decision-makers across the country. And participants in these relatively brief Common Ground meetings did not have the opportunity to develop their ideas in detail, or test what they would mean for families in different circumstances. Nor was there time available to resolve the complex issue of how child support guidelines should address the obligations of mothers and fathers who are responsible for supporting children other than those they have in common. But, guided by a sense of what was fair and what would work for low-income families, participants moved toward agreement on some principles.

Many participants were concerned that under most existing guidelines, poor noncustodial parents who manage to increase their income to just above the low-income threshold are required to pay such high percentages of their income as child support — in most states, higher percentages than middle- and upper-income noncustodial parents are required to pay¹¹⁹ — that they may be discouraged from continuing or increasing their work "on-the-books." In order to provide a better work incentive for these parents, most participants recommended a progressive guideline that would gradually increase the percentage of income that low-income noncustodial parents are required to provide as child support. Percentages would start at the level represented by the minimum order the state chooses for an obligor at 50% of

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

poverty, and phase in gradually, with the full guideline percentages applying when the noncustodial parent's income reaches about 150% of poverty. For example, if the minimum order is \$20 per month, the effective percentage of income required for an obligor with income equal to 50% of poverty would be about 5.6%.¹²⁰ Under this proposal, the percentage of income required to be paid as support would increase gradually, with the full guideline percentages applying when the noncustodial parent's income reaches about 150% of poverty.

Other participants disagreed; they thought that most guidelines already allow noncustodial parents to pay a smaller percentage of income toward the support of their children than custodial parents do. They were concerned that a recommendation that states reduce guideline percentages below current levels for low-income noncustodial parents would not adequately balance the needs and responsibilities of equally poor (or poorer) custodial parents and their children.

Many participants also were concerned about the work disincentives for low-income custodial parents under the income-shares guidelines used by a majority of states. Because income-shares guidelines reduce the percentage of income that is due as child support as combined parental income increases, modest increases in earnings by a custodial parent can reduce the amount of child support owed by the noncustodial parent, even though the latter's income and ability to provide child support is unchanged. A majority of participants recommended that in states using income-shares guidelines, increases in the income of the custodial parent should not affect the child support award until the custodial family has income at least 150 or 200% of the poverty line, net of child care expenses. That would assure low-income custodial parents that increases in their income to moderate levels would not lead to a reduction in child support.

After intense discussions, a majority of participants agreed to the following proposals for the structure of child support guidelines: for noncustodial

parents with incomes less than 50% of the federal poverty level, guidelines should provide for presumptive minimum orders in the range of \$20-\$50 per month. Guidelines should provide for presumptive zero orders for poor noncustodial parents who are unable to work, such as incarcerated or institutionalized parents. Above the minimum level, the percentages payable as support by noncustodial parents should phase in gradually, with the full guideline percentages applying when noncustodial parent income reached about 150% of the federal poverty level. The income of custodial parents should not be taken into account in setting award levels unless the income of the custodial household is at least 150% of the federal poverty level, net of child care costs. Participants thought that a structure of the kind described above could be integrated with different guideline models, with some adjustments. The hybrid approach outlined by participants has similarities to the approach utilized in the Massachusetts and District of Columbia guidelines, and the "Enhanced Marginal Expenditure" model developed by the American Law Institute.¹²¹ In addition, a number of states have developed hybrid approaches, such as using percentage-of-income guidelines with lower percentages for setting awards for obligors at low-income levels, while using income-shares guidelines for higher-income families.¹²²

However, a few participants remained troubled by these proposals, and did not think they would be appropriate in the absence of other policy changes. Especially in states that provide minimal assistance to custodial parents and children, some participants thought that a recommendation that would reduce the child support obligations of noncustodial parents would be inequitable, except perhaps as part of a comprehensive plan, such as child support assurance or incentives, that would ensure other increased support for poor children.¹²³ And several participants thought that, unless the child support payments were going to children, the obligations these recommendations would impose on low-income noncusto-

States should expressly evaluate and improve the impact of their child support guidelines on both low-income parents.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

States should take affirmative steps to reduce the number of orders set by default, and to avoid or minimize the use of imputed income.

dial parents would be too harsh, and not in the best interests of the children.

d. Determining Income Fairly for Low-Income Parents

Common Ground participants recognized that for low-income noncustodial parents the award levels set by child support guidelines may be less important than the way the amount of income is determined. For example, a guideline may provide that an obligor with income of \$500 per month (\$6,000 per year) should pay a minimum order of \$50. However, if a decisionmaker imputes income of \$10,000 per year, the amount of child support this obligor is ordered to pay will be much higher than the minimum. Common Ground participants also recognized that accurately determining income for low-income parents may be difficult. Their earnings may not show up on regular wage records and, for a variety of reasons, low-income noncustodial parents may fail to appear at hearings when award levels are set. Because they often do not have stable living arrangements, some may not receive notice of hearings; others may receive notice, but not understand its significance, or may be reluctant to interact with the formal legal system. In the absence of information or in the face of information showing minimal earnings, decisionmakers may utilize a figure representing either what is thought to be the actual (if unreported) income, or the income that the decision-maker feels the noncustodial parent can or should be making.

Common Ground participants had differing perspectives on the imputation of income. Proponents of imputation spoke of cases they had handled in which they knew that the noncustodial parent was working but could not prove his earnings. Some noted that it is especially difficult to determine income accurately for some individuals (e.g., the self-employed, immigrants with no formal work documentation). They also talked about cases in which noncustodial parents quit their jobs for lower-paying positions in order to minimize child support payments. Although child support agencies have access

to new-hire reporting and other enforcement tools, some participants with experience with state child support offices said that the agencies are not as proficient at tracking down noncustodial parents' earnings as they are supposed to be. If income could not be imputed, or could only be imputed at very low levels, noncustodial parents with the ability to hide their income, including some middle- and upper-income parents, would be able to minimize their child support obligations.

Opponents of imputation were equally concerned that unrealistic levels of income are being imputed and used as the basis for support awards. They emphasized that the nature of the low-wage market, in which individuals have long spells of unemployment and job shifting, and the discrimination that many low-income men of color face, make it unrealistic and potentially unfair to assume that everyone can get a full-time, minimum wage job. And some participants argued that individuals should be able to change employment or seek training, even if this reduces the income they have available for child support.

The use of imputed income in default cases raised additional concerns for some participants. These participants noted that some states have much higher default rates than others, and that in such cases, states may simply rely on a universal standard of imputed income that could overestimate or underestimate actual income. Participants agreed that states should make an increased effort to ensure that parents receive actual and more understandable notice of hearings, and the assistance they need to participate, to reduce the number of orders set by default. Participants also urged that states make a greater effort to obtain actual income information in all cases, including defaults, to avoid or minimize the use of imputed income.

Participants recognized that even with greater efforts by states, some noncustodial parents would fail to appear at hearings and neither the child support agency nor the custodial parent would have information about their income or earnings history. Some

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

participants thought that the parents for whom a minimum or even a zero order would be most appropriate might be the least likely to appear. They recommended that if there is no evidence of a work history in a default case, a minimum order (or even a zero order) should be set; others felt that this would reward parents who failed to appear. There was no consensus on this issue.

Participants also discussed situations in which the noncustodial parent is present when the order is being set, but has an income that is lower than a previous income, has an erratic income, or is unemployed. Practitioners in responsible fatherhood programs advise fathers to come forward and work with the child support system, rather than avoid it, so they can obtain an order that reflects their ability to pay.¹²⁴ They noted that if the information fathers provide about their actual earnings and circumstances is ignored, because it fails to meet some abstract standard, the resulting award feels more like a punishment for failure than an appropriate and equitable order. Several participants suggested using a noncustodial parent's work history over a recent period of time as a basis for determining income in instances of erratic, under-, or unemployment. They thought this could serve as a disincentive to altering work patterns in anticipation of a hearing and an incentive for the noncustodial parent to obtain employment that is reflective of his earning potential. To ensure that it have this effect, participants suggested that there would need to be regular, periodic reviews of these orders and, ideally, programs to assist parents to find employment and deal with the review process.

Although participants did not reach agreement on all issues related to the imputation of income, participants did agree that child support agencies should make greater efforts to obtain information about an individual's actual income and work history and use that information in setting awards. Participants thought this would increase the fairness of awards, reduce the buildup of arrears, and increase the likelihood that support would be paid.

e. Payment in Cash or in Kind

Common Ground participants recognized that given the choice, some custodial parents would choose not to establish and enforce a support award through the formal child support system against a low-income noncustodial parent who is providing support to the best of his ability, whether in cash or in kind (e.g., in the form of material items, caregiving, etc.)¹²⁵ or who is cohabiting with the custodial parent. The first Common Ground report on paternity establishment recommended that the requirements that custodial parents receiving public assistance assign their support rights to the state and cooperate in support enforcement be eliminated, so that custodial parents, not the state, would decide whether to seek support through the formal child support system.¹²⁶ However, when monetary support is ordered, most participants did not consider in-kind support to be an appropriate form of payment of child support.

Several participants noted that it is difficult to monitor payment of in-kind support.¹²⁷ Others noted that the kinds of items that make up most informal transfers — diapers, clothes or shoes, gifts given during visits¹²⁸ — are of economic and symbolic value, but are no substitute for cash payments that can be used to pay rent and other bills, and that cash support is critical, particularly in the context of time-limited public assistance. Moreover, since in-kind support is not recognized among wealthier families, some participants suggested it should not be recognized among poorer families in the interests of maintaining a uniform system. In addition, several participants pointed to the need for the custodial parent to be recognized as the head of her household, who can best judge what items are needed on a day-to-day basis. In addition, participants noted that if the custodial parent is receiving government assistance, material items given in support are re-calculated based on their cash value, and receiving them is usually counted against the family's eligibility and level of benefits. Consequently, the majority of participants — while they acknowledged that some parents

Custodial parents should be able to choose whether to seek a formal child support award, but when monetary support is ordered, payment should be in cash.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

States should not order low-income parents to pay for private health insurance that they cannot afford, which diverts resources needed for child support without actually securing health care coverage.

might wish to negotiate these issues on their own outside of the formal child support system — did not recommend permitting in-kind support payments in lieu of cash payments.

f. Securing Health Insurance at Reasonable Cost

Common Ground participants pointed out that for many low-income parents, private health insurance is out of reach. They were concerned that ordering low-income parents to pay for private health insurance that they cannot afford is generally futile and even counterproductive, diverting resources needed for child support without actually securing health care coverage. However, participants thought there are a number of ways child support agencies could help children obtain affordable, accessible and comprehensive health care coverage — public or private.

The Common Ground participants endorsed a number of principles developed by the HHS-DOL Medical Child Support Working Group.¹²⁹ Participants agreed that private health care coverage should be ordered only when it is affordable at reasonable cost, and that reasonable cost generally should be redefined as a percentage of the income of the parent purchasing it. (The Medical Child Support Working Group recommended 5% of gross income, the standard used in the State Children's Health Insurance Program, S-CHIP.) Participants also thought that below a certain income level, private coverage should not be ordered; instead, parents should focus their limited resources on monetary child support, and children should be able to obtain coverage through Medicaid or S-CHIP. (The Medical Child Support Working Group suggested, as a best practice, that states not require parents whose net income is below 133% of poverty to provide private coverage.)

Participants also agreed that child support agencies should consider whether the available private health care coverage will offer accessible and comprehensive services. Private health care coverage should not be ordered if the coverage only offers

services outside of the geographic location in which the child resides or if the services offered are inadequate to meet the basic health needs of the child. Participants noted that coverage available through a custodial parent may offer greater access to services, especially when the noncustodial parent and child do not reside in the same geographic area. Custodial and noncustodial parents may prefer to have coverage ordered through the custodial parent, with the noncustodial parent contributing to the cost.

Finally — and perhaps most importantly for low-income parents who may both lack access to affordable private health insurance — participants wanted child support agencies to play an affirmative role in helping to enroll low-income children who cannot obtain comprehensive, accessible, and affordable private health coverage through either their custodial or noncustodial parent in Medicaid, S-CHIP, or other available state-sponsored health programs.

g. Minimizing Debts to the State in the Initial Award

Common Ground participants shared a number of concerns about adding retroactive support obligations to the state to the initial child support order. As they discussed at the first Common Ground meeting, participants were concerned that the prospect of large debts could discourage low-income parents from establishing paternity or otherwise coming into the child support system.¹³⁰ Participants also were concerned that requiring low-income parents to use their limited resources to pay down debts to the state means less current support for custodial parents and children. Participants recognized that for the poorest obligors, it may not make much of a difference whether debts are \$500, \$5,000, or \$50,000, since virtually any amount is out of reach. However, for the children of obligors with low to moderate earnings, not requiring the obligor to pay an additional 20–25% of the child support order to the state for retroactive support would mean more income available to the children. In addition, the existence of a large debt to the state could subject noncustodial

parents to tough enforcement measures, even if they were doing a reasonable job of keeping up with current payments.

Many participants thought that states should not impose retroactive child support obligations for the reimbursement of state public assistance costs. Six states already have a policy of not pursuing retroactive support.¹³¹ Alternatively, states should not impose retroactive obligations to reimburse the government for public assistance benefits on individuals with incomes below 200% of poverty. Although no states appear to have adopted this specific standard, several states give the decision-maker discretion not to order retroactive support if it would cause an undue economic hardship to the obligor or if there is evidence the obligor had no income.¹³² In addition, participants emphasized that if states set retroactive support awards, they must comply with the legal requirement that awards be set under the guidelines, based on income rather than the amount of public assistance paid to the family.

Common Ground participants also discussed policies concerning the award of retroactive child support to custodial parents. Participants agreed that laws that give more favorable treatment to state claims for retroactive support to reimburse public assistance costs than to custodial parents' claims for such support have harsh effects on both low-income fathers and mothers. They place a greater responsibility on the fathers of children who received public assistance than the fathers of children who did not, although the former group of fathers is much more likely to be poor themselves. They also make it more difficult for mothers to seek retroactive support on their own behalf, and to collect current support, because of the state's additional claims on fathers' limited resources. While agreeing that it is unfair to give states greater claims to retroactive support than custodial parents and children, participants struggled to define the circumstances under which retroactive support should be awarded to custodial parents.

Participants were especially concerned about custodial parents who are prevented from obtaining a

support award because the noncustodial parent actively and successfully evades service of process and adjudication of an award. Unless custodial parents could seek retroactive support, their children would be permanently deprived of support for the period of evasion. Some participants noted that delays by overburdened state child support agencies in filing cases and securing orders also cause children to lose their claims to support for long periods of time. In these cases, too, retroactive support may be warranted. However, other participants thought that allowing custodial parents to seek retroactive support for an extended period because of agency delay penalizes noncustodial parents for the agency's delay without generating much additional support from low-income noncustodial parents. In the time available, participants did not resolve when it would be appropriate to award retroactive support to custodial parents, for how long, or possible limitations on the right to seek retroactive support, including statutes of limitation and equitable defenses.

b. Reimbursement of Medicaid Birthing Costs

Common Ground participants agreed that requiring low-income fathers to reimburse states for the Medicaid costs incurred for the birth of their children, as some states and counties do, is especially detrimental to young parents. As discussed in the first Common Ground report, if paternity establishment results in the immediate imposition of thousands of dollars of debt to the state for repayment of Medicaid birthing costs, low-income fathers and mothers may be discouraged from establishing paternity. Participants also noted that the addition of Medicaid debts to the child support award, like the addition of retroactive support debts to the state, can make it more difficult for low-income fathers to meet their current support obligations. Some fathers resent that they, but not the mothers, are required to reimburse Medicaid costs. Participants emphasized that these policies put additional stress on the fragile relationships of young parents at a critical time in their — and their child's — life. They also thought

States should not give more favorable treatment to their claims to retroactive support than to custodial parents' claims.

II. SETTING CHILD SUPPORT AWARDS FOR LOW-INCOME FAMILIES

that providing access to health care for indigent pregnant women and newborn children serves a vital public interest — but that it is wrong for the government to require equally poor fathers to reimburse

the government for these expenditures for the benefit of all. Participants agreed that low-income fathers should not be required to reimburse Medicaid birthing costs.¹³⁵

*States should not
require low-income
fathers to reimburse
the Medicaid
birthing costs of
low-income
mothers and
newborn children.*

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

Even if an award is appropriate when it is set, it is likely to need adjustments over the course of a child's life, as the income of the parents and the needs of the child change. This is especially true in the difficult and uncertain lives of low-income parents. Low-wage jobs are often unstable. Poor parents — mothers and fathers — face higher rates of disability and incarceration than the general population, which can affect their ability to work. The structure of many means-tested benefits programs means that a small increase in earnings for custodial parents can produce an even greater loss of public benefits and increase in expenses; for example, as they lose eligibility for child care subsidies and other forms of assistance.

In addition, for the reasons discussed in Chapter II, there are special challenges to setting appropriate initial awards for low-income families. Tensions around how initial awards are set — in general and in specific cases — are magnified when awards are extremely difficult to change. Low-income mothers and fathers need meaningful access to a review and adjustment process that will help ensure that child support awards reflect the changing circumstances of their lives.

I. Review and Adjustment: The Legal and Policy Context

Congress has recognized the importance of periodically reviewing and adjusting child support awards. Research indicates that the earnings of non-custodial parents generally increase over the first 18 years of a child's life, and that even fathers who are poor when their children are born can make substantial contributions to their children's support over time, though the payments may not be regular.¹³⁴ The income of custodial mothers also changes, as do children's needs.

There are two ways to seek a change in a support award. In cases being enforced by the state child support agency, the state must have a procedure for the periodic review and adjustment of awards, at least every three years, upon the request of either parent

or the state in a public assistance case.¹³⁵ In addition, in all cases, states must have a procedure for modifying an award upon the request of a parent who can demonstrate a "substantial change of circumstances."¹³⁶ Both approaches are discussed more fully below.

a. Periodic Review and Adjustment by State Child Support Agencies

Federal law requires that states have procedures for the review and adjustment of child support orders enforced by the state child support agency every three years upon the request of *either* parent or, in a public assistance case, of the state, taking into account the best interests of the child involved.¹³⁷ To obtain this periodic review and adjustment, the requester does not have to show a "substantial change in circumstances."¹³⁸ However, the state is not required to conduct any periodic reviews except upon request.

In a system in which the periodic review and adjustment process is driven by requests, parents must have notice of their rights. Under federal law, states must notify both parents at least every three years of their right to request the state to review and, if appropriate, adjust the order.¹³⁹ However, a 1999 OIG survey of state practices on review and adjustment found that 18 states did not comply with the federal requirement that parents be given notice every three years, and nine had no plans to do so.¹⁴⁰ Although, as the OIG survey noted, "[t]he point of exit from public aid is an optimal time to encourage custodial parents to request a review of child support orders," it found that with rare exceptions, states did not use proactive measures to promote review requests from parents close to exiting public assistance.¹⁴¹ Even with notice of their rights, to make a fully informed decision about whether to request or challenge a review and adjustment parents may need additional information, such as financial information about the other parent; however, federal law does not require parents to exchange or the state to provide such information.

Child support awards are likely to need adjustments over the course of a child's life, especially in the difficult and uncertain lives of low-income parents.

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

Federal law gives both custodial and noncustodial parents the right to a periodic review and adjustment of child support awards every three years.

Under federal law, states have three options for carrying out the periodic review and adjustment. First, they can review the order under the guidelines and, if appropriate, adjust the order. Second, they can apply a cost-of-living adjustment (COLA) to the order; third, they can use automated methods, including comparisons with wage or state income tax data, to identify orders due for review and calculate the adjustment. However, if a state chooses the second or third method to conduct the review and adjustment, it must allow either parent to contest the adjustment within 30 days by requesting a review and adjustment under the guidelines. (For example, if the state applies a COLA, a noncustodial parent may request a guidelines review because his income failed to keep pace with inflation; a custodial parent may request a guidelines review because she believes the noncustodial parent's income increased much more than inflation.)

The "review" and "adjustment" represent distinct stages of the process. Federal law states that the state shall "review and, if appropriate, adjust the order."¹⁴² This has been interpreted by OCSE as allowing states to decline to adjust the order, even if the review produces a new amount, using a "reasonable quantitative standard based upon either a fixed dollar amount or percentage, or both."¹⁴³

Nearly all states (48) require that a proposed adjustment exceed a certain threshold before they will make an adjustment to an order, even after a review. The 1999 OIG survey found that state percentage thresholds for adjustment range from 10% to 30%, and dollar thresholds range from \$10 to \$100 per month.¹⁴⁴ In several states, both the percentage and the dollar standard must be met before an adjustment will be made. For example, Washington State requires that the difference between the newly computed and the old order must be at least \$100 and 25%.¹⁴⁵ Under this standard, if the existing order is \$200 per month, and the review calculates an order of \$250, the order is not adjusted because this 25% increase is only \$50 higher. Similarly, an adjustment of \$100 per month is not made to an existing order

of \$500, since it only represents a 20% change. As discussed below, states use quantitative standards in another way: to decide when a variance is large enough to constitute a "substantial change of circumstances" and justify a modification outside the periodic review and adjustment cycle. However, many states appear to apply the same high quantitative standards they use in that context to determine whether to make an adjustment following a periodic review.¹⁴⁶ This would appear to contradict the explicit federal statutory requirement that "any adjustment under clause (i) [the periodic review] shall be made without a requirement for proof or showing of a change of circumstances."¹⁴⁷ And 40 states apply the thresholds even if the order has not been reviewed in the last three years.¹⁴⁸

Federal law gives both custodial and noncustodial parents the right to a periodic review and adjustment. In response to the OIG survey, all states reported that they conduct a periodic review upon the request of either parent. However, the more in-depth study the OIG conducted in ten states reveals that actual practice differs from official policy in some offices. Even when state policy calls for reviews in response to noncustodial parent requests, some workers or local offices indicated that they do not conduct such reviews.¹⁴⁹

Some states did acknowledge that, as a matter of policy, they deal with adjustment of orders differently depending on whether the adjustment indicated by the review is upward or downward, was requested by the custodial or noncustodial parent, or is in a public assistance or non-public-assistance case. Seventeen states reported that they proceed with the adjustment process differently if the review indicates that a downward adjustment would be appropriate.¹⁵⁰ For example, in 12 of these 17 states, noncustodial parents must file on their own for such an adjustment.¹⁵¹ In two of these states, custodial parents not receiving public assistance also must file on their own for an adjustment, even if the periodic review indicates that an upward adjustment is appropriate.¹⁵² In at least one of the 17 states, the state agency will not file for

a downward adjustment for a noncustodial parent, but will hire a private attorney to represent such a noncustodial parent.¹⁵³ (Whether the state agency would represent a custodial parent wishing to oppose the adjustment in such a case or appoint an attorney for her, or whether she would be left on her own is unclear.) Two of the 17 states reported that they do not adjust orders downward; one state has a "clean hands" statute which provides that only noncustodial parents who do not owe arrears may have their orders reviewed or adjusted.¹⁵⁴

Finally, state child support agencies are not subject to performance measures, incentives, or penalties related to how well or poorly they perform the review and adjustment function, in contrast to other required child support enforcement activities — paternity establishment, order establishment, collection of current support, and collection of arrears.¹⁵⁵ State administrators and caseworkers therefore have few incentives to devote significant resources to reviewing and adjusting awards.

b. Periodic Review and Adjustment of Medical Support

Under federal regulations, the need to provide for a child's health care expenses also establishes the right to petition for adjustment of an award.¹⁵⁶ However, the 1999 OIG survey of state practices on review and adjustment indicates that states do not consistently pursue medical support, even if a periodic review indicates that a medical support order is warranted.¹⁵⁷ All states reported that it is their policy to check for and add medical support to orders they review.¹⁵⁸ However, in seven of the ten states visited by the OIG, child support staff said that they do not always pursue medical support if the order does not otherwise require adjustment.¹⁵⁹ In some states, caseworkers reported that judges consider cases involving only medical support a low priority; in other states, caseworkers believed that it is not state policy to pursue medical-support-only adjustments, or they are uncertain when they should do so.¹⁶⁰

The OIG also expressed concern that the increasing reliance on COLAs to adjust orders may result in a decline in medical support orders. The OIG found in 1999 that states that were using or planning to use the COLA method to review and adjust orders were not planning to include medical support in the review process.¹⁶¹

c. Modification for "Substantial Change of Circumstances"

In addition to the periodic review and adjustment, parents have the right to seek a modification of a child support award outside of the periodic cycle when they can demonstrate a "substantial change in circumstances."¹⁶² In many states, this review is conducted by the courts rather than the child support agency. The definition of "substantial change of circumstances" varies from state to state, but generally, courts require that the party seeking a modification demonstrate that there has been a change of circumstances that is material, substantial and permanent, and not just trifling or temporary.¹⁶³ Under the common law test, many courts also require that the change have been unforeseeable at the time the original order was entered, and that the party requesting the modification show both a change in the child's needs and the noncustodial parent's ability to pay.¹⁶⁴ Thus, applying the common law standard, some courts have held that showing only a substantial increase in the obligor's income, or an increase in the cost of living, is not grounds for a modification of an award.¹⁶⁵

The adoption of child support guidelines has added to the common law standard other grounds for seeking a modification of a child support order, making it easier to obtain a modification because of a substantial change in circumstances. Most states now hold that there has been a change of circumstances warranting modification if there is a significant variance — as defined by the state — between the existing award and the award that would result from an application of the guidelines.¹⁶⁶ The variance may be the result of a change in one of the factors used to

Parents have the right to seek a modification of an order outside of the periodic review cycle if they can show a "substantial change in circumstances."

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

Incarceration is a significant factor in the development of child support arrearages.

determine awards under the guidelines — income, for example — or a change in the guidelines themselves.

Nearly every state has set a quantitative standard for determining when the variance between the existing award and amount under the guidelines is sufficient to request a modification.¹⁶⁷ The percentage standards vary from 10% to 30%; some standards specify an absolute dollar figure as an alternative to, or in addition to, the percentage. For example, Texas requires a change of 30% and \$50 a month; Illinois sets a standard of 20% or \$10, whichever is less.¹⁶⁸ Demonstrating the required amount of variance gets a petitioner over the "substantial change in circumstances" threshold; it does not ensure that the order will be changed. As with any calculation under the guidelines, the award amount is presumptive, and parties may argue that there are grounds for deviating from the guidelines. Courts also may consider the reasons for the change in circumstances in deciding whether to grant a modification.

Whether using the traditional "substantial change in circumstances" standard or determining if there is a substantial variance from the guidelines amount, in deciding whether to grant a modification courts also are likely to consider whether the change in circumstances was voluntary or involuntary, and, if voluntary, whether the change was made in good faith.¹⁶⁹ For example, most courts recognize the onset of a disability that greatly reduces the ability to work as an involuntary and substantial change warranting a modification. Most courts would treat quitting a job in order to avoid paying child support as both voluntary and in bad faith, and deny a modification.¹⁷⁰ However, many cases fall somewhere in the middle, and states — and individual judges — use different approaches.

When the loss of a job is attributed to the behavior of the parent — such as fighting on the job, stealing from an employer, tardiness or drinking — but the behavior was not engaged in for the purpose of avoiding child support obligations, decisions vary. A number of courts have refused to grant a modifica-

tion when the loss of a job is due to a parent's misconduct, even though they recognize the parent's inability to earn at the level assumed in the order and even the futility of continuing the order at the current level, reasoning that a modification would shift the consequences of the wrongdoing to the child and other parent.¹⁷¹ Other courts have modified orders in such circumstances, emphasizing the lack of intent to avoid child support obligations, and the reality of the obligor's inability to pay.¹⁷² However, even when unemployment or underemployment is not found to be willful, and a modification is granted, courts may impute income at a level higher than the parent's actual earnings.¹⁷³ (Imputation of income also is an issue in the setting of initial awards; see Chapter II, *supra*.)

d. Modifying Awards for Incarcerated Noncustodial Parents

When obligors are incarcerated, their ability to work and pay child support clearly changes substantially. However, different approaches to the issues of voluntariness and good faith have produced different decisions on whether incarceration can be a substantial change in circumstances justifying modification of a child support order. Most courts have held that because incarceration is involuntary, it can be the basis for a modification of a child support award, at least if it is unrelated to the failure to pay support, and if there are no other income or assets from which the obligation can be satisfied.¹⁷⁴ Other courts have held that because incarceration is the result of a voluntary criminal act, it should not be the basis for a modification.¹⁷⁵

Incarceration is a significant factor in the development of arrearages, according to research by state child support agencies into the characteristics of their "hard-to-collect" cases and the composition of their arrearages. Colorado has estimated that nearly 20% of all the arrears in the child support program are associated with cases where the obligor is or has been incarcerated, although some of these arrears may have accumulated before or after the period of

incarceration.¹⁷⁶ Washington State has found that 30% of its debtors in hard-to-collect cases have been incarcerated.¹⁷⁷

2. Reaching Common Ground on Improvements to the Review and Adjustment Process

Common Ground participants who work with both low-income mothers and fathers expressed concern that the policies for reviewing and adjusting support awards are unresponsive to the circumstances of the lives of low-income families. Orders that fail to reflect increases in the earnings of non-custodial parents deprive low-income custodial parents and children of badly needed support. Orders that fail to reflect decreases in the earnings of low-income noncustodial parents who lose jobs, become disabled or become incarcerated can lead to mounting arrears and serious sanctions, including jail, for noncustodial parents, without increasing the support that children are likely to receive.

However, Common Ground participants recognized that there are a number of potentially competing interests to consider in developing recommendations to increase access to the review and adjustment process. It is important that awards be appropriate in light of current income and needs, but some stability also is important, so that parents can budget for the payment or receipt of a known amount of child support. In some circumstances, the ability to petition freely for a modification could be abused by parties manipulating their income to get a lower award, or simply harassing the other parent. The resources of state child support agencies are also limited; requiring agencies to review and adjust awards too frequently competes with other important service needs. Within this context, participants explored ways to overcome the barriers that low-income mothers and fathers face to obtaining a review and adjustment of their orders.

a. Helping Parents Decide Whether to Seek a Review and Adjustment

Under federal law, child support agencies are required to review or adjust orders only upon the request of a parent or the state in a public assistance case. However, many low-income parents do not know of their rights to seek a review and adjustment, Common Ground participants reported. Participants who work with low-income mothers reported that many mothers do not know about possibilities for getting a review and adjustment of their order. Some leave welfare with minimum orders set years before, and may be eligible for an increase in support that could help them provide for their child. But, lacking information about their rights, they do not request a review and adjustment. Participants who work with low-income fathers reported that many do not know that they may request review and adjustment of an order on a periodic basis, or even know that they must do so, if their circumstances change, to avoid accumulating large arrearages.

In some locations, parents may not receive even the minimal written notice required by federal law every three years, or the written notice may be undermined by agency workers, for example by telling fathers that the agency will not review orders at the request of noncustodial parents, even though federal law requires them to do so. Even if parents receive notice of their rights, they may not have the information to make an informed decision about whether to request a review and adjustment.

Participants agreed that states should explain what the review and adjustment process is, how to utilize the process, and how parents can get the specific information they need — for example, about changes in the financial circumstances of the other parent — to decide whether it is worth pursuing. And agencies should ensure that all their workers know that, by law, child support agencies must conduct a periodic review at the request of either parent.

Participants thought that state child support agencies should play a more proactive role, informing

Awards should be appropriate in light of current income and needs, but some stability also is important, so parents can budget.

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*Low-income parents
especially need
access to a review
and adjustment
process more
frequently than
every three years.*

parents whose circumstances appear to have changed about their options for seeking a review and adjustment, with parental control over the ultimate decision about whether to proceed. For example, when the child support agency identifies a parent leaving TANF, or when the agency's automated system shows a significant change in a parent's earnings, incarceration of a parent, or receipt of unemployment or disability payments, the participants thought the agency should notify parents about their options for requesting a review and adjustment through the periodic process or by seeking a modification because of a substantial change in circumstances.

b. Increasing Access to a Timely Review and Adjustment

Participants agreed that because of multiple instabilities in the lives of low-income parents, and the lack of other resources to help a parent cope when a child support award is too low or too high, parents must have access to a review and adjustment process more frequently than every three years. Some states have a shorter periodic review period, and some state child support agencies will undertake a review and adjustment outside the periodic review cycle in some circumstances. But some agencies, participants reported, provide no assistance to parents seeking a review of an order outside the 3-year periodic review cycle.

Participants discussed different approaches to increasing access to a timely review and adjustment. Some participants recommended that periodic reviews of child support orders for low-income families should be available every six or 12 months. Others thought that it would be difficult to establish different intervals between periodic reviews based on parental income, and that allowing periodic reviews so frequently in all cases would put a burden on the other parent to respond as well as on child support agencies. These participants pointed out that low-income parents also could get increased access to reviews when they need them by improving access to a

modification for a "substantial change of circumstances" (see *infra*).

c. Improving the Periodic Review and Adjustment Process

Common Ground participants discussed how the various methods states can use for the review and adjustment process — review under the guidelines, automatic COLA, or automated review and adjustment — work for low-income parents, and how they can be improved. The full guidelines review is the most thorough — and the most resource-intensive. Participants recognized that states might be more willing to conduct reviews more frequently if the process were simpler, and discussed alternative methods for conducting the reviews.

Some participants thought states should adopt the option for an automatic COLA, with parents having the right to seek a full review under the guidelines. These participants noted that this approach takes the burden off custodial parents to request the adjustment, is simple to make, and ensures that the order automatically will reflect increases in cost of living, if not other changes in the parent's income and expenses such as child care. However, some participants were concerned that if an order is established at an inappropriate amount, the automatic COLA adjustment compounds this problem and leads to the build up of larger arrearages. Moreover, many low-income fathers do not have the pattern of stable earnings that increase along with inflation which the COLA method assumes. Participants agreed that if states use a COLA, both parents should be notified of their right to appeal the adjustment and request a full review under the guidelines.

Participants thought child support agencies should utilize their automated systems in the review and adjustment process in a variety of ways. In particular, participants thought the systems could identify cases in which there appeared to be a significant change in a parent's circumstances and provide a preliminary estimate of the possible change in the order that could help parents decide whether to re-

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

quest a review. However, participants did not recommend that states adopt the option for doing the review and adjustment entirely through their automated systems. Participants recognized the limits of automated systems to gather all the relevant information, especially about the circumstances of low-income parents who may work off the books or not have filed tax returns.

Common Ground participants discussed another automatic approach that some jurisdictions have utilized in the past: expressing the child support order as a percentage of the noncustodial parent's gross income. For example, if a guideline calls for an award to be 20% of gross income, and the noncustodial parent earns \$2,000 per month, under a "percentage-expressed" order his obligation would be 20% of his income instead of \$400/month. If his income rises to \$2,500, his obligation automatically rises to \$500 per month; if it falls to \$1,500, his obligation automatically falls to \$300. Research in Wisconsin, which utilized percentage-expressed orders until recently,¹⁷⁸ found that using such orders in conjunction with income withholding increased payments over time.¹⁷⁹

Although the idea of having orders expressed as percentages that would adjust automatically for changes in income appealed to several Common Ground participants, others pointed to practical problems. It would only work in the minority of states using simple guidelines based on percentage-of-obligor income, not in states using income-shares guidelines or other models, and would work only for orders being enforced by wage withholding. Participants also recognized that percentage-expressed orders present practical problems for child support agencies and employers. Employers find them difficult to respond to for purposes of wage withholding, and percentage-expressed orders make it more difficult to determine whether an obligor is in compliance and to determine the amount of an arrearage. Indeed, federal requirements concerning the use of automated systems and uniform rules in interstate cases preclude the use of percentage-expressed orders in cases being enforced by state child support

agencies.¹⁸⁰ Thus, most participants concluded that percentage-expressed orders were not a viable way of achieving automatically adjusted orders.

d. Making Adjustments When Adjustments Are Due

Common Ground participants expressed frustration that even when a periodic review is conducted, and the child support agency calculates a different award, the vast majority of states will not adjust the order unless the difference exceeds the threshold set by the state. This creates serious hardships for low-income mothers and fathers who must continue to live with orders that are acknowledged to be too low or too high for their circumstances. Participants emphasized that poor mothers and children need all the child support to which they are entitled. For a mother struggling to house, feed, clothe, and provide care for her children on \$800 a month, an extra \$49 a month makes a big difference. But some states consider such adjustments (and even larger adjustments) too small to bother with. On the other side, many poor fathers are already expected to pay a higher percentage of their income in child support than middle or upper-income obligors. Requiring a poor father to continue to pay an order that is \$49 per month (or more) too high leaves him facing even greater deprivation or greater arrearages and the consequences that go with them.

Eventually, the discrepancy between what the award should be and what it is may exceed the threshold. But, participants noted, a later prospective adjustment will not compensate either parent for past hardships. In addition, the refusal to make incremental adjustments means that when adjustments finally are made, they are larger, making compliance potentially more difficult and producing greater tension between parents.

Denying parents adjustments that have been determined to be appropriate also undermines their confidence in the child support system. To say that parents have a right to a review of their orders every three years, conduct the review, calculate a new

States should not refuse to adjust orders after a periodic review because the state considers the adjustment too small.

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

States should make the process for securing a review and adjustment outside of the periodic review cycle more accessible.

award — and then refuse to implement the adjustment — makes little sense to parents or the Common Ground participants. Participants agreed that states should not be permitted to use a quantitative threshold to decide whether to make an adjustment following a periodic review.

e. Adjusting Medical Support When Appropriate

Common Ground participants thought it was important for child support agencies to address the issue of medical support when child support awards are periodically reviewed, as well as when they are initially set, to help children secure and maintain health care coverage. During the review process, agencies can identify changes in parents' employment status or income that may affect their ability to obtain affordable, accessible, comprehensive health care coverage for their children. (See Chapter II, *supra*, for discussion of ways to improve the establishment of medical support awards.) If appropriate private coverage is not available to either parent, child support agencies should help children obtain public coverage. For example, a custodial mother who has left welfare for work since her child support order was established or last reviewed may have lost Medicaid coverage. She may not know that her children are eligible for coverage through S-CHIP, which in most states covers children in families with income up to 200% of poverty.¹⁸¹ At the time of the review, the child support agency, through a coordinated effort with the state S-CHIP and Medicaid agencies, could help enroll the children in the appropriate program.

f. Improving Access to Modifications for a Substantial Change in Circumstances

In addition to the periodic review process, federal law requires that states, on the request of either parent, modify an order if there has been a "substantial change in circumstances." In practice, however, Common Ground participants said that this option is

often difficult for low-income parents to pursue for two reasons: they are unaware of this right or how to exercise it, and some states define "substantial change in circumstances" very narrowly.

Some participants thought that noncustodial parents faced greater barriers than custodial parents in obtaining a modification of an order. Participants have worked with fathers who go to the state child support agency for help with an order because they lost a job, only to be told that the agency will not assist parents seeking a downward modification of an order. Some agencies provide information about how parents can proceed on their own, but sometimes no advice or information is given.

Common Ground participants who work with low-income mothers, as well as those who work with low-income fathers, agreed that it was unfair and counterproductive for child support agencies to deny assistance to parents who seek a downward modification because of a substantial change in circumstances. However, participants struggled with how child support agencies should respond, outside the periodic review cycle, to conflicting requests and information from parents. Participants recognized that some low-income noncustodial parents need help to pursue appropriate downward modifications. They also recognized that there are some noncustodial parents who can and do manipulate their apparent income to reduce their child support obligations.

Participants agreed that all states should make the modification process more accessible to low-income parents, as some states already have done. If child support agencies are not prepared to undertake a review and adjustment themselves outside of the periodic review cycle, they should inform parents that they have the right to seek a modification elsewhere if there has been a substantial change in circumstances. State courts and child support agencies should cooperate in developing simplified procedures and forms and good explanatory materials to help parents seek a modification on their own. Courts or agencies also should make staff available to answer parents' questions about the process.

Participants also thought that states should review their criteria for establishing a "substantial change in circumstances" to make them more responsive to low-income parents' needs and the realities of their lives. Participants recognized the need for states to use a quantitative threshold to determine whether reconsideration of an order outside of the periodic review process is warranted. With no quantitative threshold, a parent with resources could file motion after motion to modify an order based on trivial changes in income or other circumstances, burdening the other parent and the court. (This risk does not exist in connection with the periodic review and adjustment process; accordingly, as discussed above, Common Ground participants agreed that no quantitative threshold should be used to determine whether to make an adjustment following a periodic review.) Several participants thought the quantitative standards used by some states are too high, but in the time available, participants did not resolve what the standard should be. Participants did agree that certain circumstances, such as leaving TANF or being incarcerated (see below), automatically should be considered grounds for review.

g. Modifying Awards for Incarcerated Parents

Common Ground participants identified the continuation of child support obligations while parents are incarcerated and unable to pay as a major factor in the buildup of arrears, and an additional barrier to helping parents put their lives back together when they are released. Most of this discussion, as with most of the work state child support agencies are doing with incarcerated parents, focused on the child support issues faced by incarcerated noncustodial fathers. However, participants noted that incarcerated custodial mothers whose children are placed in the foster care system may be required to pay child support to the state to reimburse foster care costs, and that these debts may hinder their ability to reunite with their children when they are released.

Common Ground participants thought that state policies or judicial decisions that prevent the modifi-

cation of orders while parents are incarcerated may build up arrearages on paper, but may decrease, rather than increase, the amount of support that ultimately is paid. Participants explored various options for improving child support policies for incarcerated parents and their children.

Participants discussed whether the policies should be the same for parents incarcerated for nonpayment of support and those incarcerated for other reasons. Some participants believed that suspending or dramatically reducing the child support obligation of a parent who is incarcerated for willfully failing to pay support effectively rewards such behavior. Other participants noted that whatever the reason for the incarceration, incarcerated parents have little or no ability to pay support. Several participants also observed that some parents jailed for nonpayment of support may not be willful deadbeats, but may have had limited ability to pay support at the time they were incarcerated. Other participants acknowledged problems with the way criminal sanctions for non-support are imposed, but believed that because criminal sanctions require a finding of willfulness, it would be anomalous to suspend the child support obligation of someone incarcerated for nonsupport. Participants were not able to reach agreement on this issue.

Most participants thought that the most effective way to ensure that orders are adjusted promptly would be the presumptive suspension of an order during a period of incarceration. (A similar approach is to lower orders presumptively to the minimum amount.) Incarcerated obligors would not have to petition for a modification. However, custodial parents would be given notice of the proposed suspension or reduction and an opportunity to challenge it. Participants also noted that in addition to suspending support obligations, further accumulation of interest on previously accrued arrears should be presumptively suspended, to prevent child support debt from growing during a period of incarceration.

North Carolina appears to provide an example of the suspension approach. Its law states that a child

States should make their criteria for establishing a "substantial change in circumstances" more responsive to the realities of low-income parents' lives.

III. REVIEWING AND ADJUSTING CHILD SUPPORT AWARDS

*States should
adopt policies to
help incarcerated
parents modify their
support awards.*

support payment or relevant portion thereof is not past due, and no arrearage occurs, during any period when the obligor is incarcerated, is not on work release, and has no resources from which to make the payment.¹⁸² A number of other states have statutes or policies dealing with the child support obligations of incarcerated inmates, but none automatically suspends support during incarceration or automatically initiates the modification process.¹⁸³

Participants recognized that policy makers may be reluctant to adopt this approach, and explored other options, such as helping incarcerated parents apply for a modification of their support orders. Colorado, Massachusetts, and several other states are experimenting with this approach, including outreach to prisoners, educating prison staff, developing *pro se* materials and streamlined procedures, and providing connections to community services for released offenders.¹⁸⁴ Participants thought these developments are positive. However, some expressed concern that it will be difficult for states to implement these pro-

grams on a universal basis: to do the continuing outreach needed to inform all affected inmates about modification procedures, and to ensure that state child support agencies and courts — which are having such difficulty dealing with modification of orders in other situations — could respond to their requests.¹⁸⁵ Evaluations of these programs should provide information to advance policies in this area.

Participants also discussed ways to meet the needs of children who are deprived of support during the incarceration of a parent. Participants concluded that it is not politically feasible to allow the children of prisoners to receive support from funds for crime victims, but hoped that, as more attention was paid to the needs of incarcerated parents, resources also would be devoted to helping find support for their children. This could be done through special programs for prisoners and their families, or through a broader system of child support assurance.

IV. MANAGING ARREARS

Many low-income noncustodial parents owe thousands of dollars of child support debt. Much of the debt owed by low-income noncustodial parents is owed to the state as reimbursement for public assistance or Medicaid costs; some is owed to custodial parents and children. Some arrearages have built up over time through the failure to make current support payments that may or may not have had a reasonable relationship to the ability to pay; other debts are the result of adding retroactive support or Medicaid debt to an initial child support obligation. Improved policies for preventing and managing arrears could help noncustodial parents make regular and timely contributions to their children's support, benefiting low-income mothers and fathers.

1. Arrears: The Legal and Policy Context

The federal Office of Child Support Enforcement reports that \$84 billion in arrears are owed in cases in the federal-state child support system.¹⁸⁶ However, as states look more closely at the debt on their books, they are discovering that the causes are more complex than deadbeat parents refusing to pay the child support they owe to their children. The policy choices a state makes concerning the use of default orders, the setting of award levels, the imputation of income, the addition of retroactive support or Medicaid reimbursement, the charging of fees or interest, the modification of awards, all contribute to the size and character of the state's child support arrears and the debt burdens on low-income noncustodial parents.¹⁸⁷

A recent analysis of California's child support debt found that 70% of the debt is owed to the State of California; 30% is owed to families.¹⁸⁸ Seventy percent of California's arrears are attributable to default orders, which California relies on to an unusual extent. 70% of all child support orders in California and 75% of orders in Los Angeles are entered by default.¹⁸⁹ And, in default cases, California sets awards based generally on the size of the public assistance grant, while not high in absolute terms, such orders may exceed the ability of many low-income parents

to pay and increase the size of the debt on the books.¹⁹⁰ The study found that about 800,000 individuals owed arrears, and about half had reported earnings in California in 1999.¹⁹¹ For those with reported earnings, annual earnings averaged \$18,000, but half of those with reported earnings (about 200,000 debtors) showed earnings below \$10,000.¹⁹² Lower-income obligors had a greater debt burden; on average, those with earnings less than \$10,000 had child support debts averaging four times their annual earnings, while the debt burden on those with earnings greater than \$10,000 was only half their annual earnings.¹⁹³

In Colorado, defaults were less of a factor; 11% of Colorado cases with arrears have default orders.¹⁹⁴ But Colorado's practice of routinely adding retroactive support when opening a case was largely responsible for making the amount of prior-year support due per case nearly twice the national average.¹⁹⁵

The state of Washington analyzed its "hard-to-collect" cases, defined as open cases with debts over \$500 and no collection in the past six months.¹⁹⁶ Most of the debt in these hard-to-collect cases, 72%, is owed to the state.¹⁹⁷ The study revealed "the pervasiveness of serious, recurring barriers to collection."¹⁹⁸ Almost half of the noncustodial parents had multiple child support cases.¹⁹⁹ Over 30% received public assistance or Supplemental Security Income for at least part of the 29-month project period, and had long histories of intermittent employment, physical or mental illness, chemical abuse, and other problems.²⁰⁰ At least 12% were incarcerated during the study period, and at least 30% had corrections records.²⁰¹

Federal law prohibits the retroactive modification of arrears.²⁰² This provision, often referred to as the "Bradley Amendment" because it was sponsored by then-Senator Bill Bradley, was adopted because in some states judges were reducing the amounts of past-due support owed to custodial parents, depriving children of needed support and making it impossible to enforce past-due support as a final judgment, especially in interstate cases.²⁰³ However, states have

The policy choices that states make contribute to the size and character of the arrears that low-income noncustodial parents accumulate.

IV. MANAGING ARREARS

*Promptly
establishing and
enforcing support
orders can prevent
the build-up
of arrears.*

flexibility under the Bradley Amendment to deal with arrears. OCSE has advised states that the Bradley Amendment does not prevent a party to whom arrears are owed — either a state or a custodial parent — from agreeing to a compromise of the judgment, in the same way that other judgments may be compromised under state law.²⁰⁴ And OCSE has supported a number of state initiatives that involve compromising arrearages that have been permanently assigned to the state to enable noncustodial parents to focus on the payment of current support.

2. Reaching Common Ground on Managing Arrears

a. Preventing the Accumulation of Arrears

When arrears build up to uncollectible levels, low-income mothers and fathers both lose. Common Ground participants explored a number of ways to prevent the accumulation of arrears by promoting the regular payment of support. Improved policies concerning the setting and modifying of support awards, as discussed in previous chapters of this report, represent important "arrears prevention" strategies.²⁰⁵

Participants also emphasized the importance of prompt establishment and enforcement of support orders as a way to prevent the development of arrearages. Participants who work with low-income fathers have clients who found themselves unexpectedly months behind in payments because they assumed, incorrectly, that a withholding order had been put in place promptly after their visit to the child support office. Some low-income fathers are not sure how or where to make child support payments, a problem that is compounded in some states by a rocky transition from a localized payment system to a centralized collection and disbursement system. One participant suggested that if the state child support agency is responsible for a delay in establishing an order or getting wage withholding in place, the state should provide the family with support during the period of delay, rather than penalize either

the custodial or noncustodial parent. All agreed that prompt establishment of orders and initiation of wage withholding must be a high priority for state agencies.

Whether a state adds interest to a child support debt can make a substantial difference in how quickly arrearages grow, and policies vary among the states.²⁰⁶ For low-income noncustodial parents, some participants contended, adding interest simply increases the size of an already uncollectible debt. Other participants who work with custodial parents responded that, as a general matter, there are good reasons for charging interest when support payments are late. When support is owed to the custodial parent, the addition of interest helps compensate for the delay in payment. And, since most other creditors routinely charge interest, if there were no penalty for failing to make child support payments on time, obligors might decide to make their child support payments last, instead of first. However, the potential incentive effects of charging interest often are lost because some child support agencies are unable to indicate to obligors what the interest payment is and how it accrues. Obligor may not realize that interest is being charged until they are close to paying off the underlying debt, only to discover that interest is still owed. Participants agreed that when interest is charged, the amount attributable to interest should be included separately in billing and accounting statements.

Most participants recommended that to the extent that overdue child support is owed to the state, interest should not accrue. As an alternative to this preventive strategy, waivers or suspension of interest on support owed to the state should be part of the state's arrearage compromise policy (see *infra*). Participants did not agree on whether low-income noncustodial parents should be exempt from interest charges on arrears owed to custodial parents and children. However, participants did agree that state child support agencies should provide parents with clear, regular billing statements that show what portion of their obligation is due to interest accrual.

Participants considered other options for preventing the buildup of arrears owed to the state, such as limiting the amount of arrears that can accumulate in certain circumstances.²⁰⁷ Putting a limit on the arrears that can accumulate avoids the problem of retroactive modification since the arrears are not being modified or compromised; they have never come into being.

Participants agreed that while noncustodial parents are receiving means-tested public assistance themselves, are incarcerated or institutionalized, the amount of arrears owed to the state that can accumulate should be limited. They thought that this would recognize that noncustodial parents in such circumstances cannot and should not be expected to repay the state for public assistance provided to their children. These are the types of circumstances in which zero or sub-minimum orders would be appropriate. Participants also thought that even under a greatly improved system for setting and modifying orders, expecting these extremely disadvantaged parents to advocate successfully for an order below the presumptive minimum, or to obtain a timely modification is unrealistic. While an automatic limit on the buildup of arrears would reduce the state's ability to offer forgiveness of state debt as an incentive for keeping up with current support payments, participants doubted that this incentive would have much of an effect on the very poorest parents.

Participants also discussed whether limiting the amount of arrears to the state that could accrue made sense for other noncustodial parents who were poor when their arrears accrued or for noncustodial parents who were not poor, but accrued debts to the state because their obligations exceeded their ability to pay. Most participants concluded that an automatic cap would not be workable or appropriate for such situations. However, debts owed to the state in such cases might be adjusted under a state's arrearage compromise policies, as discussed below.

b. Crediting In-Kind Support Against Arrears

Most Common Ground participants agreed that when monetary support is ordered through the formal child support system, "in-kind" contributions of goods or services are not an appropriate form of payment of current support (see Chapter II, *supra*). However, some participants noted that, particularly for low-income parents, arrears may accrue in sympathetic circumstances; for example, if the parent thinks that support obligations automatically are suspended if the child comes to live with him or his family for an extended period.

Common Ground participants considered whether, under circumstances such as these, in-kind contributions or payments should be credited against arrears. Several participants thought that incidental expenditures on a child — occasional contributions of clothing, food, or gifts — should not be credited against arrears. They thought that this approach would be unmanageable and would create an unwelcome precedent for counting such contributions against current support. They noted that parents at all income levels who fail to make support payments might seek to reduce their arrearages by showing that they made occasional expenditures on the child.

Participants discussed a more focused approach to the issue of credits against arrears developed by the American Law Institute. ALI recommends that states allow direct expenditures on the child made in lieu of child support *with the consent of the other parent* to be credited against arrearages, and concludes that this could be done without violating the Bradley Amendment.²⁰⁸ Under this interpretation, for example, if the parents agreed informally that the child would go to live with the father for six months, and that neither parent would pay support, the direct expenditures on the child made with the mother's consent would offset the arrears that appeared to accrue during that period. Or, if the parents agreed that the noncustodial parent would pay the rent rather than support payments, these payments could be credited against arrearages. Receipts

States should consider limiting or compromising arrears owed to the state that accumulate in certain circumstances, such as incarceration.

IV. MANAGING ARREARS

Reducing arrears owed to the state gradually as parents make current support payments is better for low-income parents than all-or-nothing amnesty policies.

showing that the noncustodial parent had occasionally bought food, clothing, or toys for the child would not offset an arrearage where there was no agreement that these were a substitute for support payments.

Participants noted, however, that this approach would not work for families that received public assistance. Without a change in the law, establishing that the father made expenditures on the child would not satisfy the state's claim for arrears, and might expose the mother to charges of welfare fraud. There also could be difficulty establishing whether the parents agreed that direct expenditures were being made in lieu of child support. Participants were unable to resolve the issues, but thought the American Law Institute approach should be considered further.

c. Compromising Arrears that Have Accrued

Common Ground participants focused on policies concerning the compromise of arrears owed to the state, because neither the state child support agency nor a court may reduce the arrears owed to the family without the agreement of the custodial parent.²⁰⁹ However, participants noted that some custodial parents would be willing to consider forgiving some of the arrears they are owed, especially if the child support agency has a program that links forgiveness to making regular payments and has procedures in place to ensure a swift and appropriate response if payments stop.

Participants wanted to see the development of systematic policies in this area. Leaving the issues to the discretion of individual caseworkers can produce uneven and unfair results, and some low-income fathers may not have the knowledge or communication skills to invoke caseworker discretion. Participants noted that some child support offices are simultaneously developing more flexible policies on compromising state arrears and keeping them secret, "it's an attempt to institutionalize without anyone finding out."

Participants agreed that well-designed policies linking the compromise of state arrears to the payment of current support could benefit both low-income mothers and fathers. Participants also thought that states should consider the source of the arrears; arrears that accrue because an obligor fails to meet an obligation under an appropriate order should be treated differently than arrears that accrue because the state adds a large retroactive welfare or Medicaid debt, or bases an award on an unrealistically high level of imputed income.²¹⁰

Participants welcomed the various initiatives states were undertaking to implement amnesty or arrearage compromise policies. However, participants thought that some approaches work better than others for low-income families. For example, some "enforcement amnesty" policies suspend enforcement of arrears owed to the state as long as current support is paid, reinstating the arrears in full if a current support payment is missed. Participants were concerned that the same problems that led to the buildup of arrears in the first place, such as unstable employment and living arrangements, make it unlikely that low-income noncustodial parents in these situations could consistently meet current support obligations. Several participants preferred a gradual debt-reduction approach -- reducing arrears by a specified amount with each payment of current support²¹¹ -- to an all-or-nothing amnesty approach. They thought that this would provide a more meaningful incentive to low-income parents to make as many current support payments as they could, and to resume paying current support as quickly as possible after an interruption, rather than feeling that they were back to square one.

Partnerships between fatherhood programs and state child support agencies can improve the implementation of arrearage-compromise policies, Common Ground participants thought. Programs can help reach noncustodial parents who have been avoiding the child support system because of their large debts, help noncustodial parents keep up with regular support payments, and try to resolve prob-

lems if payments are interrupted. Participants also noted that linking arrearage-compromise policies to program participation in structured ways permits experimentation and evaluation of both fatherhood programs and arrearage policies.

However, Common Ground participants thought that policies on arrearage compromise should be developed and applied broadly, not limited to individuals participating in fatherhood programs. Some participants thought that there are not enough programs nationally to serve all noncustodial parents who could benefit from arrearage amnesty, management, or compromise policies. Conversely, not all

noncustodial parents for whom more flexible arrearage policies would be appropriate need the services offered by fatherhood programs.

Finally, participants noted that all families who rely on the child support system, and the child support system itself, could benefit from a new approach to arrears owed to the state. Focusing agency resources on collecting child support for families, rather than on trying to collect old debts to the state, would increase the effectiveness of the child support program in its primary mission: helping children receive support from both their parents.

Partnerships between fatherhood programs and child support agencies can improve the implementation of arrearage-compromise policies, but such policies should not be limited to participants in fatherhood programs.

V. RECOMMENDATIONS FOR IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN

The goal of these recommendations is to improve the way child support awards for low-income families are set and adjusted, and the way arrearages are handled, to increase the ability of low-income parents to support their children and themselves. They build on the recommendations in the first Common Ground report, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Fathers and Children*.

These recommendations are interrelated and complementary; for example, setting realistic initial awards can reduce the buildup of arrears. Adopting policies specifically designed to increase family income along with reforms designed to improve the way limited parental income is allocated for the support of children can have an even more profound effect on increasing the economic and emotional support available to children. Although not every Common Ground participant agrees with every recommendation, a majority of the participants supports each of the recommendations.

1. Child support policies for setting and adjusting child support obligations should be supported by federal and state policies designed to increase the income of low-income mothers, fathers and children.

- a. Congress and the states should adopt policies that give child support payments to children to increase their well-being, rather than to the state and federal governments as reimbursement for public assistance.
- b. Congress and the states should support programs to improve services for low-income mothers and fathers to increase their capacity to provide adequately for their children.
- c. Congress and the states should support demonstrations of programs to stabilize and supplement low and irregular child

support payments, such as child support assurance programs to guarantee a minimum amount of child support and/or child support incentive programs to match the child support payments of low-income non-custodial parents.

2. Congress and the states should ensure that child support awards for low-income families are set through a fair process that takes account of parents' actual income and circumstances.

- a. States should give both parents notice of the proceedings at which awards will be set, information about the operation of child support guidelines, and the opportunity to participate in the proceedings and provide information about their income and circumstances.
- b. States should ensure that child support guidelines expressly address award levels for low-income obligors, rather than leave the setting of such awards to administrative or judicial discretion. As required by federal law, all awards calculated under child support guidelines, including minimum awards, must be presumptive, not mandatory.
- c. States should avoid or minimize using imputed income to set child support awards by requiring child support agencies to make greater efforts to obtain information about parents' actual income and work histories, including in default cases.
- d. Congress and the states should enable all custodial parents, including those receiving public assistance, to choose whether to establish and enforce a child support award through the formal child support system by eliminating the requirement that, as a condition of receiving public assis-

V. RECOMMENDATIONS FOR IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN

- tance, custodial parents cooperate with the state in establishing and enforcing child support awards.*
- e. If monetary child support is ordered, states should require that payment be in cash, not through the provision of in-kind goods or services.*
3. The federal-state child support system should do more to help children obtain affordable, accessible, and comprehensive health care coverage, private or public.
- a. The federal Office of Child Support Enforcement should revise its current regulation that assumes that any group health care plan is "available at a reasonable cost" to a parent. The regulation should redefine "reasonable cost" as a percentage of parental income (no more than 5% of gross income) and direct, or at a minimum allow, states to decline to order a parent whose income is below a certain level (for example, 133% of poverty) to pay for private coverage.*
- b. In addition to determining whether private health care coverage is available at reasonable cost (as redefined), states should determine whether the health care plan provides accessible and comprehensive care to the child, before ordering a parent to enroll a child in that plan.*
- c. Congress and the states should require that when accessible and comprehensive private health care coverage is not available at reasonable cost (as redefined), state child support agencies should enroll eligible children in public health insurance programs such as Medicaid and the State Children's Health Insurance Program.*
- d. As required by federal law, states must pursue medical support as part of the setting of the initial order and the review and adjustment process, and should do so in accordance with the principles outlined above.*
4. States should avoid or minimize adding retroactive debts owed to the state to the child support obligations of low-income parents.
- a. States should not impose on low-income parents retroactive child support obligations owed to the state for the reimbursement of public assistance costs. At a minimum, states should limit the number of years for which retroactive support to reimburse such costs may be sought, and ensure that state claims for retroactive support do not receive more favorable treatment than custodial parents' claims. States must, as required by federal law, base the amount of retroactive support on state child support guidelines, rather than on the amount of public assistance provided to the child.*
- b. States should not seek reimbursement of Medicaid costs related to pregnancy and childbirth from low-income fathers. (States already are prohibited from seeking such reimbursement from low-income mothers under federal law.)*
5. States should improve low-income parents' access to review and adjustment of their child support awards to reflect the changing circumstances of their lives.
- a. State child support agencies should ensure that all their workers know, and correctly advise parents, that under federal law the agency must undertake a periodic review and adjustment at least every three years at the request of either parent in cases being enforced by the agency, and that in all cases, at the request of either parent,*

V. RECOMMENDATIONS FOR IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN

the state must review and modify an award outside of the periodic review cycle if the requesting parent can demonstrate a "substantial change in circumstances," as defined by the state.

- b. In addition to complying with the federal requirement that states notify both parents at least every three years of their right to request a periodic review and adjustment of orders being enforced by state child support agencies, states should provide better information to both parents about how to utilize the periodic review and adjustment process and the process for modifying awards if there is a "substantial change in circumstances."*
- c. State child support agencies should consider undertaking review and adjustment of the orders they are enforcing, especially in cases involving low-income families, more frequently than every three years or outside of the periodic review cycle and should be proactive in informing parents about their options for seeking a review when the agency is aware of changes that might warrant an adjustment: for example, a parent's income has changed substantially, a parent is leaving TANF, or child care expenses have changed.*
- d. The federal Office of Child Support Enforcement should change its current regulation allowing states to use a quantitative threshold to decide whether to adjust an order after the state calculates a new amount in a periodic review. In the absence of such a change, states should eliminate such use of a quantitative threshold. (However, outside of the periodic review cycle, states should continue to be able to use a reasonable quantitative threshold to decide whether a "substantial change in circumstances" exists.)*
- 6. States should develop policies to minimize the buildup of arrears for low-income noncustodial parents and promote the timely payment of support to custodial parents and children.*
 - a. State child support agencies should promptly establish orders and implement wage withholding.*
 - b. For low-income incarcerated parents, states should adopt laws that presumptively suspend child support awards (and any interest on awards) or reduce them to a minimum level upon incarceration, at least for parents incarcerated for reasons other than willful nonsupport. Custodial parents must receive notice of the presumptive suspension and be given an opportunity to rebut the presumption. In the absence of such a policy, state child support agencies should provide information to incarcerated parents about how they may request a periodic review and adjustment or modification because of a substantial change in circumstances.*
 - c. States should not charge interest on the portion of any child support debt that is owed to the state. Whenever interest is charged, the amount attributable to interest should be included separately on the billing statement.*
 - d. States should limit the amount of child support debt owed to the state that can accrue while a noncustodial parent is receiving means-tested public assistance, is incarcerated, or institutionalized.*
- 7. States should develop systematic policies on the compromise of arrears owed to the state.*
 - a. State policies on the compromise of arrears owed to the state should be well-defined*

V. RECOMMENDATIONS FOR IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN

and publicly available, not left entirely to the discretion of individual child support agency workers.

- b. *State policies on the compromise of arrears owed to the state should consider the source of the arrearage (for example, arrears that result from a large award of retroactive support to the state, the addition of Medicaid birthing costs, or a default order based on an unrealistically high level of imputed income should be compromised more readily than arrears that accrued because of a failure to make payments under an appropriate award).*
- c. *State policies on the compromise of arrears owed to the state should utilize a debt-reduction approach that enables low-income noncustodial parents to reduce these arrears as they make current support payments, rather than an all-or-nothing amnesty policy that reinstates the arrears in full if a noncustodial parent fails to make a current support payment.*
- d. *States should not compromise arrears owed to the state only for individuals participating in fatherhood programs; however, states should recognize that fatherhood programs have an important role to play in implementing arrearage-compromise policies.*

Proposal Concerning the Design of Child Support Guidelines for Low-Income Families

The following proposal concerning the design of child support guidelines for low-income families is not presented as a general recommendation to all states because, although supported by a majority, several Common Ground participants had serious concerns about the approach, especially in states that provide minimal assistance to custodial parents and children and in cases in which the child support payments of a poor noncustodial parent are used to reimburse the government for public assistance, rather than provided to the children. The proposal is included here to promote further consideration of these difficult issues by state policy makers and advocates, in the context of other state policies on child support and assistance to low-income mothers, fathers and children.

State child support guidelines should include presumptive minimum orders in the range of \$20 to \$50 per month for noncustodial parents with very low incomes (50% of the poverty level or less); for very poor noncustodial parents who are clearly unable to work, such as incarcerated or institutionalized parents, the presumptive award should be zero.

The child support amounts payable above the minimum order should be phased in gradually, starting with the percentage represented by the minimum order for income at 50% of the poverty level, to the full guideline percentage at about 150% of poverty. The income of custodial parents should not be taken into account in setting award levels until the custodial parent's household has income at about 150% of poverty, net of child care costs.

ENDNOTES

1. This report generally assumes that the mother is the custodial parent and the father is the noncustodial parent.
2. National Women's Law Center and Center for Fathers, Families, and Public Policy, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Fathers and Children* (2000), available at <http://www.nwlc.org/pdf/commgmd.pdf> [hereinafter *Family Ties*].
3. *Id.* at 27.
4. *See id.* at 3.
5. *See* Office of Child Support Enforcement, U.S. Department of Health & Human Services, *FY 2000 Preliminary Data Preview Report Table 1.2* (2001) (computations by NWLC) [hereinafter *FY 2000 Preliminary Data*].
6. For a summary of the legislative history of the child support program, see Committee on Ways & Means, U.S. House of Representatives, *2000 Green Book: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means* 463-65, 531-36.
7. *See* Kenneth R. White & R. Thomas Stone, Jr., *A Study of Alimony & Child Support Rulings with Some Recommendations*, 10 *Fam. L.Q.* 75, 83 (1976) (noting the lack of "uniform consistency" among various judges' methods for calculating child support awards); Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 *Denv. L.J.* 21 (1979) (child support awards made by a single district court ranged from 6% to 52% of an obligor's income for one child and from 6% to 42% of an obligor's income for two children).
8. The average child support award in 1983 was \$2,521. Bureau of the Census, U.S. Department of Commerce, Series P-23, No. 148, *Child Support and Alimony: 1983 (Supplemental Report)* 10 Table G (1986). A conservative estimate of annual expenditures that could have been expected to be made on behalf of two children in a two-parent, medium income family in 1983 was \$10,028. Thomas J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures* 3 (1984) (Espenshade's 1981 estimates updated to 1983 dollars using the Consumer Price Index).
9. *See* Yee, *supra* note 7, at 36.
10. *See* Diane Dodson & Robert M. Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 *Fam. L. Rep.* (BNA) 3051, 3059 (1984). This article discusses the early use of numerical guidelines in Delaware, Wisconsin, and Washington.
11. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), § 18(b) (current version as amended codified at 42 U.S.C. § 667(a) (2001)).
12. Family Support Act of 1988, Pub. L. No. 100-485, § 103(a) (1988) (current version codified at 42 U.S.C. § 667(b)(2) (2001)).
13. *See id.* § 103(b) (current version codified at 42 U.S.C. § 667(a) (2001)). Federal regulations require states conducting these reviews to consider economic data on the cost of raising children, and to analyze case data on the application of, and deviations from, the guidelines. *See* 45 C.F.R. §§ 302.56(c), (h).
14. Federal regulations concerning the substance of guidelines require only that they take into consideration all earnings and income of the absent parent, be based on specific descriptive and numeric criteria and result in a computation of the support obligation, and provide for the children's health care needs through health insurance coverage or other means. *See* 45 C.F.R. § 302.56(c). Consideration of the best interests of the child is not required by the regulations in the guidelines themselves, but is re-

- quired when deviating from the guidelines. See *id.* 302.56(g).
15. For more discussion of the different types of guidelines used by states — income shares, percentage of income, Delaware-Melson, and hybrid — see Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* § 1.03 (Aspen Law & Business 2001 Supp.); Diane Dodson & Joan Entmacher, *Report Card on State Child Support Guidelines* 4-10 (Women's Legal Defense Fund 1994); CSR, Inc. & American Bar Association Center on Children and the Law, *Evaluation of Child Support Guidelines* Vol. I at 1.2 (Office of Child Support Enforcement, U.S. Department of Health & Human Services 1996) [hereinafter *Evaluation of Child Support Guidelines*].
 16. See Office of Inspector General, U.S. Department of Health & Human Services, *Child Support for Children on TANF* 1, OEI-05-99-00392 (2002) [hereinafter *OIG, Child Support for Children on TANF*].
 17. If the percentages in the income-shares standard were constant rather than declining, combining the incomes and prorating the share of the total child support obligation would produce exactly the same result as a percentage-of-income guideline. See Irwin Garfinkel & Marygold Melli, *The Use of Normative Standards in Family Law Decisions. Developing Mathematical Standards for Child Support*, in *Child Support Assurance* 203, 215-17 (Irwin Garfinkel et al. eds., 1992).
 18. See *OIG, Child Support for Children on TANF*, *supra* note 16, at 1.
 19. See Morgan, *supra* note 15, § 1.03(b), 1-21 Table 1-5.
 20. See Office of Inspector General, U.S. Department of Health & Human Services, *State Policies Used to Establish Child Support Orders for Low-Income Noncustodial Parents* 20-22 Table 2, OEI-05-99-00391 (2000) [hereinafter *OIG, State Policies Used to Establish Child Support Orders*].
 21. *Id.* Some states may have set income thresholds at the poverty level when they first adopted their guidelines around 1989, but failed to adjust them as the poverty level increased.
 22. See *id.*
 23. See *id.*
 24. See *id.*
 25. See Child Support Enforcement Program: \$50 Pass-through; Presumptive Support Guidelines; Mandatory Genetic Testing; Paternity Establishment; Laboratory Testing, 56 Fed. Reg. 22335, 22337 (May 15, 1991) (preamble to final regulations implementing the guidelines requirement).
 26. Office of Child Support Enforcement, U.S. Department of Health & Human Services, *Policy Information Question 00-03: State IV-D Program Flexibility with Respect to Low-Income Obligor* (2000) [hereinafter *OCSE, PIQ 00-03*].
 27. See *Evaluation of Child Support Guidelines*, *supra* note 15, Table 2-5.
 28. Federal regulations require that guidelines take into consideration all earnings and income of the noncustodial parent. See 45 C.F.R. § 302.56(c) (2001).
 29. State guidelines define what counts as "income," and, if calculations are based on "net" rather than "gross" income, what expenses may be excluded in the calculation of "net" income. See Morgan, *supra* note 15, §§ 2.00 *et seq.*
 30. See Pamela Loprest, *How Are Families that Left Welfare Doing? A Comparison of Early and Recent Welfare Leavers*, New Federalism Series B, No. B-36 at 4 (Urban Institute 2001); National Campaign for Jobs & Income Support, *Leaving Welfare, Left Behind: Employment Status, Income, and Well-Being of Former TANF Recipients* 6 (2001).

ENDNOTES

31. See David Pate, *Chapter 2: An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2* 56-62, in *W-2 Child Support Demonstration Evaluation Report on Nonexperimental Analyses, Vol II* (Daniel R. Meyer & Maria Cancian, Principal Investigators, Institute for Research on Poverty, University of Wisconsin-Madison 2002).
32. See Morgan, *supra* note 15, § 2.04.
33. See *id.* § 2.04(c)(ix); Dodson & Entmacher, *supra* note 15, at 56-59.
34. See Dodson & Entmacher, *supra* note 15, at 56-59.
35. See *id.* at 58-59. For example, under Maryland's income-shares guideline, the basic award for one child, with combined parental income of \$2,000, is \$332. If the noncustodial parent earned \$2,000, and the custodial parent earned \$0, the noncustodial parent's basic child support obligation would be \$332. If income of \$2,000 per month were imputed to the custodial parent, their combined income would be \$4,000, their combined child support obligation would be \$557, and his 50% share of that obligation would be \$278.50 — \$53.50 per month less than when no income was imputed to the custodial parent. However, if even modest child care costs of \$300 per month were imputed, the additional share of those costs — \$150 per month — would far exceed the reduction in the noncustodial parent's basic child support obligation.
36. See OIG, *State Policies Used to Establish Child Support Orders*, *supra* note 20, at 15.
37. See *id.*
38. See *id.*
39. See, e.g., *Ghidotti v. Barber*, 586 N.W2d 883, 887 (Mich. 1998); Minn. Stat. § 518.551 Subd. 5b(e) (West, WESTLAW through End of 2001 1st Sp. Sess.); Ohio Rev. Code Ann. § 3119.05(I) (West, WESTLAW through Apr. 8 2002).
40. See OIG, *State Policies Used to Establish Child Support Orders*, *supra* note 20, at 15.
41. See Office of Inspector General, U.S. Department of Health & Human Services, *The Establishment of Child Support Orders for Low Income Non-custodial Parents* 16 (2000) [hereinafter OIG, *Establishment of Child Support Orders*].
42. See OIG, *State Policies Used to Establish Child Support Orders*, *supra* note 20, at 15-16.
43. See *id.* at 16-17.
44. OIG, *Establishment of Child Support Orders*, *supra* note 41.
45. See *id.* at 16.
46. See *id.* at 17.
47. See Jessica Pearson & Esther Ann Griswold, *New Approaches to Child Support Arrears: A Survey of State Policies and Practices* (Center for Policy Research 2001), <http://www.centerpolicyresearch.org/StateSurveyReport.htm>.
48. See John M. Martinez & Cynthia Miller, *Working and Earning: The Impact of Parents' Fair Share on Low-Income Fathers' Employment* 8 (Manpower Demonstration Research Corporation 2000).
49. See *id.*
50. See *id.*
51. The OIG study reported that most of the sampled caseworkers indicated that they do not yet obtain income information from the National Directory of New Hires. See OIG, *Establishment of Child Support Orders*, *supra* note 41, at 15. However, it is not clear from the report what time period the caseworkers were describing; the case sample was drawn from 1996 cases, before the NDNH was established. See *id.* at 43.
52. See Pearson & Griswold, *supra* note 47.
53. See Christina Norland, *Fragile Families Research Brief: Unwed Fathers, the Underground*

- Economy, and Child Support Policy 2* (Bendheim-Thoman Center for Research on Child Wellbeing, Princeton University & Social Indicators Survey Center, Columbia University 2001).
54. Lauren M. Rich, *Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices?* Table 1 (Center for Research on Child Wellbeing, Working Paper No. 99-10-FE, 1999).
 55. *Id.*
 56. *Id.*
 57. *Id.* (Table 1 shows the percentage distribution of fathers with certain levels of earnings from regular-sector employment. It does not have a similar distribution for total earnings, nor does it report median earnings.)
 58. Maria Cancian & Daniel R. Meyer, *Chapter 1: Fathers of Children in W-2 Families: Results of Administrative and Survey Data, in W-2 Child Support Demonstration Evaluation Report on Nonexperimental Analyses, Vol. II, supra* note 31, at 17.
 59. *See* 42 U.S.C. § 652(f) (2001).
 60. *See* 45 C.F.R. §303.31 (2001).
 61. *See* Morgan, *supra* note 15, § 3.01(a).
 62. *See generally* Administration for Children & Families, U.S. Department of Health & Human Services, *21 Million Children's Health: Our Shared Responsibility — The Medical Child Support Working Group's Report* (2000), http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/Full_Report.pdf [hereinafter *21 Million Children's Health*].
 63. *See id.* Chs. 1, 3.
 64. *See id.* Ch. 3.
 65. *See id.* Ch. 2.
 66. *See* Office of Inspector General, U.S. Department of Health & Human Services, *Using State Child Support Enforcement (IV-D) Agencies to Increase SCHIP Enrollment* 3-4, A-01-01-02500 (2002).
 67. *See* OIG, *State Policies Used to Establish Child Support Orders, supra* note 20, at 6-9.
 68. *See id.*
 69. *Jackson v. Rapps*, 947 F.2d 332 (8th Cir. 1991).
 70. *See* Paula Roberts, *An Ounce of Prevention and a Pound of Cure: Developing State Policy on the Payment of Child Support Arrears by Low Income Parents* iii (Center for Law and Social Policy 2001) [hereinafter Roberts, *An Ounce of Prevention*].
 71. *See* Office of Child Support Enforcement, U.S. Department of Health & Human Services, *Action Transmittal 93-04: Use of Presumptive Child Support Guidelines for Establishment of Support Arrears/Collection of Unreimbursed Assistance* (1993).
 72. *See* Pearson & Griswold, *supra* note 47, Table 2.
 73. *See* OIG, *Establishment of Child Support Orders, supra* note 41, at 2-3.
 74. *See id.*
 75. *See* OIG, *Child Support for Children on TANF, supra* note 16, at 10 Table 4.
 76. *Id.*
 77. *Id.*
 78. *Id.*
 79. *See* Jessica Pearson et al., *Does Dropping Debt and Retroactive Support Affect the Payment of Child Support?*, *Child Support Quarterly* (National Child Support Enforcement Association, Washington, DC), Fall 2001, at 21-23.
 80. *See id.*
 81. For a fuller discussion of this topic, see *infra* Chapter IV, Managing Arrears.
 82. For example, under California law, noncustodial parents cannot be required to pay support for any period prior to the filing of the action for

ENDNOTES

- support unless the child has received public assistance, in which case the noncustodial parent can be obligated to the county for up to one year prior to the date of initiation of the action. See Cal. Fam. Code §§ 4009, 17402(a)(2) (West, WESTLAW through Ch. 47 of 2002 Reg. Sess.). In New York, child support orders are prospective from the date of filing or, if the child receives public assistance, from the effective date of a child's eligibility for public assistance, giving the state a greater claim to support. See N.Y. Fam. Ct. Act § 545(1) (West, WESTLAW through Ch. 68 of L. 2002).
83. See, e.g., *Wigginton v. Commonwealth ex rel. Caldwell*, 760 S.W2d 885, 887 (Ky. Ct. App. 1988) (laches barred support action where mother took no action to determine paternity for 15 years); *Dep't of Human Servs. ex rel. Parker v. Irizarry*, 893 P2d 1107, 1110 (Utah Ct. App. 1995), aff'd, *Dep't of Human Servs. ex rel. Parker v. Irizarry*, 945 P2d 676 (Utah 1997) (action for support 5 years after birth of twins barred by equitable estoppel because noncustodial parent had relied on mother's statements after the birth that she wanted nothing to do with him and started another family).
 84. See Roberts, *An Ounce of Prevention*, *supra* note 70, at 10-11, Appendix 3.
 85. See OIG, *Establishment of Child Support Orders*, *supra* note 41, at 14.
 86. See Pate, *supra* note 31, at 74 n.62.
 87. See *21 Million Children's Health*, *supra* note 62, Ch. 3.
 88. See 42 U.S.C. § 608(1) (2001).
 89. See Pub. L. 98-369, § 2640 (1984) (current version as amended codified at 42 U.S.C. § 657(a)(1) (2001)).
 90. See 42 U.S.C. § 657(a)(1) (2001).
 91. Center for Law and Social Policy, *State Policy Re Pass-Through and Disregard* (Feb. 2002), <http://www.clasp.org/pubs/childenforce/State%20Policy%20Re%20Pass%20Through.pdf>.
 92. *FY 2000 Preliminary Data*, *supra* note 5, Table 1.2 (computations by NWLC).
 93. See 42 U.S.C. § 657(a)(2)(A) (2001).
 94. See 42 U.S.C. § 657(a)(2)(B) (2001).
 95. *Child Support and Fatherhood Proposals: Hearing Before the Subcommittee on Human Resources of the House Committee on Ways & Means*, 107th Cong. (2001) (testimony of Ron Haskins, Brookings Institution & Annie E. Casey Foundation), <http://waysandmeans.house.gov/humres/107cong/6-28-01/6-28hask.htm>.
 96. *FY 2000 Preliminary Data*, *supra* note 5, Table 1.2 (computations by NWLC).
 97. See 42 U.S.C. § 657(a)(3) (2001).
 98. See Daniel Meyer & Maria Cancian, *W-2 Child Support Demonstration Evaluation Phase 1: Final Report 48* (Institute for Research on Poverty, University of Wisconsin-Madison 2001), <http://www.ssc.wisc.edu/irp/csde/phase1-tocs.htm>.
 99. See *id.* at 36.
 100. See *id.* at 62.
 101. See *id.* at 77.
 102. See *id.* at 80.
 103. See *id.* at 88.
 104. See Elaine Sorensen & Chava Zibman, *Child Support Offers Some Protection Against Poverty*, New Federalism Series B, No. B-10 (Urban Institute 2000).
 105. See generally, Office of Child Support Enforcement, U.S. Department of Health & Human Services, *1999 Report to Congress: Analysis of the Impact on Welfare Recidivism of PRWORA Child Support Arrears Distribution Policy Changes* (1999), <http://www.acf.dhhs.gov/programs/cse/rpt/1999rpt/1999report.htm>.

106. See Irwin Garfinkel et al., *Child Support Enforcement: Incentives and Well-Being* 14 (Joint Center for Poverty Research 2002); Burt Barnow et al., *The Potential of the Child Support Enforcement Program to Avoid Costs to Public Programs: A Review and Synthesis of the Literature* 39-45 (U.S. Department of Health & Human Services 2000).
107. Barnow, *supra* note 106, at 46-48.
108. *Family Ties*, *supra* note 2, at 28.
109. See Steve Savner et al., *TANF Reauthorization: Opportunities to Reduce Poverty by Improving Employment Outcomes* 2 (Center for Law and Social Policy 2002); Marieka Klawitter, *Effects of WorkFirst Activities on Employment and Earnings* (Evans School of Public Affairs, University of Washington 2001).
110. See Cynthia Miller & Virginia Knox, *The Challenge of Helping Low-Income Fathers Support Their Children: Final Lessons from Parents' Fair Share* 3, 29 (Manpower Demonstration Research Corporation 2001).
111. For more information on child support assurance, see Jane Venohr et al., *Minnesota Child Support Assurance: Program Design, Case-loads and Costs* (Policy Studies Inc. 2001); Paula Roberts, *Kellogg Devolution Initiative Paper — Beyond Welfare: the Case for Child Support Assurance* (Center for Law and Social Policy 1999); William Hamilton et al., *The New York Child Assistance Program: Five Year Impacts, Costs and Benefits* (Abt Associates 1996); Irwin Garfinkel et al. eds., *Child Support Assurance: Design Issues, Expected Impacts, and Political Barriers as Seen from Wisconsin* (Urban Institute Press 1992). For discussions of incentive payments, see Wendell Primus & Kristina Daugirdas, *Improving Child Well-Being by Focusing on Low-Income Noncustodial Parents in Maryland* (Abell Foundation 2000), <http://www.abell.org>; Robert Lerman & Irwin Garfinkel, *Rethinking the Incentive Structure for Child Support Assurance* (prepared for The Urban Institute Forum on Examining New Approaches to Promote Responsible Fatherhood, Oct. 18, 1999).
112. The median state TANF grant for a three-person family was 36% of the federal poverty level. The median state grant was \$421 per month in January 2000. See *2000 Green Book*, *supra* note 6, at 384 Table 7-7. The federal poverty guideline for a family of three in 1999 was \$13,880 per year, or \$1,157 per month. See Annual Update of the HHS Poverty Guidelines, 64 Fed. Reg. 13428-30 (March 18, 1999).
113. See 42 U.S.C. §§ 607(e), 608(a)(2), (b)(3) (2001). For a discussion of state sanction policies and practices, see Heidi Goldberg & Liz Schott, *A Compromise-Oriented Approach to Sanctions in State and County TANF Programs* (Center on Budget and Policy Priorities 2000).
114. See, e.g., Richard Freeman & Jane Waldfogel, *Does Child Support Enforcement Affect Male Labor Supply*, in *Fathers Under Fire: The Revolution in Child Support Enforcement* 94-127 (Irwin Garfinkel et al. eds., 1998) (study found that in general, men who owe child support are not encouraged to work less or enter the underground economy; however, authors noted that the low-income fathers missing from the data might be more likely to respond to child support enforcement by working less or off the books).
115. See *id.* at 115.
116. See, e.g., OIG, *Child Support for Children on TANF*, *supra* note 16, at 12 (tentatively suggesting that initially setting realistic child support orders for low-income non-custodial parents would result in increased child support payments); Maureen A. Pirog et al., *Presumptive State Child Support Guidelines: A Decade of Experience* 12 (draft, School of Public & Environmental Affairs, Bloomington, Indiana 1999) (analysis, "though not definitive," indicates that

ENDNOTES

- states with lower awards for poor noncustodial fathers experience greater compliance).
117. Nearly a third of the sample of fathers of children receiving assistance through W-2, Wisconsin's TANF program, had been incarcerated at some point for failure to pay child support. See Pate, *supra* note 31, at 64.
 118. See OIG, *Child Support for Children on TANF*, *supra* note 16, at 6-7.
 119. See Morgan, *supra* note 15, at 1-21 Table 1-5.
 120. In 2001, the HHS poverty guideline for one person was \$8,590 per year, or \$716 per month; 50% of that would be \$358 per month. See Annual Update of the HHS Poverty Guidelines, 66 Fed. Reg. 10695 (Feb. 16, 2001). The \$20 minimum represents 5.6% ($20/358 = .056$).
 121. See Mass. R. of Ct., Child Support Guidelines & Child Support Guidelines Obligation Schedule (West, WESTLAW through Apr. 1, 2002); D.C. Code Ann. § 16-916.01 (West, WESTLAW through Oct. 2, 2002); American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, Tentative Draft No. 3, Part II, Ch. 3: Child Support (1998).
 122. *Evaluation of Child Support Guidelines*, *supra* note 15, Vol. II, Part I.
 123. See, e.g., Primus & Daugirdas, *supra* note 111.
 124. See Jacquelyn Boggess & Daniel Ash, *Understanding Child Support: A Practitioner's Guide for Working with Fragile Families* 15-16 (National Center for Strategic Nonprofit Planning & Community Leadership 2001).
 125. See Maureen Waller & Robert Plotnick, *Child Support and Low-Income Families: Perceptions, Practices and Policy* Ch. 3 (Public Policy Institute of California 1999).
 126. See *Family Ties*, *supra* note 2, at 25-26.
 127. The mothers and fathers of Wisconsin children receiving TANF assistance were surveyed about informal transfers from nonresident fathers to resident mothers. Although both indicated that informal transfers were common, their reports of the frequency and extent of informal support varied. About half of mothers, but over three-quarters of fathers, reported that fathers provided some informal support. Just over 11% of mothers estimated the value of these contributions at over \$500 in 1998 and 1999; however, 48% of fathers in 1998 and 35% of fathers in 1999 estimated the value of their contributions at over \$500. See Judith Seltzer & Nora Cate Schaeffer, Chapter 8: *Nonresident Fathers' Involvement with Children: A Look At Families on W-2* 12-18, in *W-2 Child Support Demonstration Evaluation, Phase I: Final Report, Vol. II* (Daniel R. Meyer & Maria Cancian, Principal Investigators, Institute for Research on Poverty, University of Wisconsin-Madison 2002).
 128. See *id*.
 129. See *21 Million Children's Health*, *supra* note 62. Two Common Ground participants were also members of the Working Group.
 130. See *Family Ties*, *supra* note 2, at 10-11.
 131. See OIG, *State Policies Used to Establish Child Support Orders*, *supra* note 20, at 6, 8 Table 1.
 132. See Roberts, *An Ounce of Prevention*, *supra* note 70, at 9-10.
 133. The Medical Child Support Working Group recommended that the authority of child support enforcement agencies to pursue Medicaid birthing costs be eliminated. See *21 Million Children's Health*, *supra* note 62, Ch. 3.
 134. See Office of Inspector General, U.S. Department of Health & Human Services, *Review and Adjustment of Support Orders* 12, OEI-05-98-00100 (1999) [hereinafter OIG, *Review and Adjustment of Support Orders*]; Office of Inspector General, U.S. Department of Health & Human Services, *Child Support Enforcement Collections on AFDC Cases — Modification of Court Orders*, OEI-05-86-00035 (1986).

135. See 42 U.S.C. § 666(a)(10)(A) (2001).
136. See *id.* § 666(a)(10)(B).
137. See *id.* § 666(a)(10)(A).
138. *Id.* § 666(a)(10)(A)(iii).
139. See *id.* § 666(a)(10)(C).
140. See OIG, *Review and Adjustment of Support Orders*, *supra* note 134, at 7.
141. *Id.* One Massachusetts county was beginning a project in which the local public assistance office would notify the child support office of cases nearing the time limit to prompt reviews; in Oregon, public assistance workers may, but need not, send cases to child support workers for review.
142. 42 U.S.C. § 666(a)(10)(A)(i)(I) (2001).
143. 45 C.F.R. § 303.8 (2001). See also Office of Child Support Enforcement, U.S. Department of Health & Human Services, *Action Transmittal 97-10: Policy Questions and Responses to Miscellaneous Issues regarding Provisions of P.L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)* (1997) ("Question 4: Does the requirement to 'adjust the order in accordance with the guidelines' ... preclude a State law providing a threshold deviation of, for example, 15% before an adjustment is deemed appropriate? Answer 4: No ... Given the latitude States have to simply apply Cost of Living Adjustments (COLA) or to set thresholds if they use automated methods, there is similar latitude that States may determine that small deviations are 'inappropriate' for adjustment.").
144. See OIG, *Review and Adjustment of Support Orders*, *supra* note 134, Appendix A Table 2.
145. See Division of Child Support, Washington State Department of Social & Health Services, <http://www.wa.gov/dshs/dcs/mod1.shtml> (last visited April 18, 2002).
146. Compare Morgan, *supra* note 15, at 5-12 Table 5-1, listing thresholds for determining when a variance is sufficient to constitute a "substantial change in circumstances" with OIG, *Review and Adjustment of Support Orders*, *supra* note 134, Appendix A Table 2.
147. 42 U.S.C. § 666(a)(10)(A)(ii) (2001).
148. See OIG, *Review and Adjustment of Support Orders*, *supra* note 134, at 6.
149. See *id.* at 9-10.
150. See *id.* at 9.
151. See *id.*
152. See *id.*
153. See *id.*
154. See *id.*
155. See 42 U.S.C. § 658 (2001).
156. See 45 C.F.R. § 308(d)(3) (2001).
157. See OIG, *Review and Adjustment of Support Orders*, *supra* note 134, at 8.
158. See *id.*
159. See *id.*
160. See *id.* at 6.
161. See *id.* at 9.
162. See 42 U.S.C. § 666(a)(10)(B) (2001).
163. See Morgan, *supra* note 15, § 5.01.
164. See *id.*
165. See *id.*
166. See *id.* §§ 5.02, 5.03.
167. See *id.* § 5.03(b), 5-12 Table 5-1.
168. See *id.* at 5-12 Table 5-1.
169. See *id.* § 5.01.
170. Instead of denying a modification on the ground that no substantial change in circumstances had occurred, a court could reach the same result by imputing income to the parent who reduced income in bad faith. See *id.*

ENDNOTES

171. See, e.g., *In re Marriage of Hester*, 565 N.W2d 351, 354 (Iowa Ct. App. 1997); *Edwards v. Lowry*, 348 S.E.2d 259, 261 (Va. 1986); *Noddin v. Noddin*, 455 A.2d 1051, 1053 (N.H. 1983). See also *Neroni v. Neroni*, No. CA 877, 1999 WL 668794 at 2 (Ohio Ct. App. Aug. 23, 1999).
172. See, e.g., *In re Marriage of Rietz*, 585 N.W2d 226, 230-31 (Iowa 1998); *In re Marriage of Walters*, 575 N.W2d 739, 743 (Iowa 1998); *Starck v. Nelson*, 878 S.W2d 302, 307 (Tex. Ct. App. 1994); *Lee v. Lee*, 459 N.W2d 365, 370 (Minn. Ct. App. 1990).
173. See, e.g., *Lutke v. Lutke*, 750 So.2d 512, 519-20 (La. Ct. App. 2000).
174. See *Morgan*, *supra* note 15, § 2.04(c)(iii).
175. See *id.*
176. See Janet K. Atkinson & Barbara Cleveland, *A Report of the NPCL Partners for Fragile Families Peer Learning College — Managing Ar-rears: Child Support Enforcement and Fragile Families* 11 (National Center for Strategic Non-profit Planning & Community Leadership 2001).
177. See *id.*
178. In 2001, Wisconsin passed a law requiring orders in all cases being enforced by the state child support agency to be stated in dollar amounts rather than percentages. See 2001-2002 Wis. Legis. Serv. 16 at §§ 3786e, 3786f, 3788g, 9358(8ck) (West).
179. See Judi Bartfeld, *Long-Term Impact of Percentage-Expressed Child Support Orders on Payments* 19 (Institute for Research on Poverty, University of Wisconsin-Madison 1995).
180. See Office of Child Support Enforcement, U.S. Department of Health and Human Services, *Dear Colleague Letter 94-25: UIFSA Retreat Notes* (1994) ("The American Society for Payroll Managers (ASPM) wants sum certain orders. UIFSA states must agree to a certain level of standardization prior to implementation of direct withholding.").
181. See Families USA, *Disparities in Eligibility for Public Health Insurance: Children and Adults in 2001* Table 1 (2002). Some of these states may have effective eligibility levels slightly higher than 200% of poverty when their liberal income disregard provisions are applied.
182. See N.C. Gen. Stat. § 50-13.10(d) (1999).
183. See *Pearson & Griswold*, *supra* note 47, Table 4.
184. See *Atkinson & Cleveland*, *supra* note 176, at 11, 15.
185. An evaluation of Colorado's demonstration project to help noncustodial parents in prison with the modification process found that it was very arduous; the staff involved in the project saw some benefits but did not find it to be cost effective. See Esther Griswold et al., *Testing a Modification Process for Incarcerated Parents* i-ii (Center for Policy Research 2001).
186. See *FY 2000 Preliminary Data*, *supra* note 5, Table 1.12. Seventy percent of the debt is owed in current and former assistance cases; 30% is owed in never-assistance cases.
187. See generally, *Pearson & Griswold*, *supra* note 47; OIG, *Establishment of Child Support Orders*, *supra* note 41; OIG, *Child Support for Children on TANF*, *supra* note 16; Roberts, *An Ounce of Prevention*, *supra* note 70; *Atkinson & Cleveland*, *supra* note 176.
188. See *Atkinson & Cleveland*, *supra* note 176, at 14.
189. See *id.*
190. See *id.*
191. See *id.*
192. See *id.*
193. See *id.* at 14-15.
194. See *id.* at 9.

195. See Pearson & Griswold, *supra* note 47.
196. See Jo Peters, *Child Support Performance Measurements: A Test for Working Hard-to-Collect Cases* ix (State of Washington Department of Social & Health Services 1999).
197. See *id.* at 30.
198. See *id.* at x.
199. See *id.*
200. See *id.*
201. See *id.*
202. See 42 U.S.C. § 666(a)(9) (2001).
203. See 132 Cong. Rec. S5303-04 (daily ed. May 5, 1986) (comments of Sen. Bill Bradley); Omnibus Budget Reconciliation Act of 1986, H.R. Conf. Rep. No. 1012 (1986).
204. See Office of Child Support Enforcement, U.S. Department of Health & Human Services, *Policy Interpretation Question 99-03: Public Policy Supporting Two Parent Families/Compromise of Arrearages* (1999); OCSE, PIQ 00-03, *supra* note 26.
205. See generally Roberts, *An Ounce of Prevention*, *supra* note 70.
206. Twenty-four states charge interest on past-due support, 27 states (including the District of Columbia) do not. See Roberts, *An Ounce of Prevention*, *supra* note 70, at 11, Appendix 3. Some states charge a lower rate of interest on child support arrears than the state's general interest rate on judgments. See *id.*
207. New York, for example, puts a cap of \$500 on the amount of arrears that can be accrued by a noncustodial parent whose income is at or below the poverty income guidelines established by the federal Department of Health & Human Services for a single person. See N.Y. Dom. Rel. Law § 240(1-b)(g) (2001).
208. See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Tentative Draft No. 3, Part II, § 3.27 (1998).
209. See OCSE, PIQ 00-03, *supra* note 26.
210. For a sample matrix on arrears forgiveness, see Roberts, *An Ounce of Prevention*, *supra* note 70, at 43 Appendix 8.
211. A variant would forgive a percentage of the arrears for making current support payments for certain periods of time; for example, Iowa's pilot program granting forgiveness of 15% of the arrears after six months of regular payment, 35% after 12 months, and 80% after 24 months. See *id.* at 16.

PARTICIPANTS IN THE COMMON GROUND MEETINGS ON DETERMINING CHILD SUPPORT OBLIGATIONS*

Daniel Ash, Director of Communications
Center on Fathers, Families, and Public Policy

Jacquelyn Boggess, Senior Policy Analyst
Center on Fathers, Families and Public Policy

Nancy Duff Campbell, Co-President
National Women's Law Center

Professor Karen Czapanskiy
University of Maryland School of Law

Joan Entmacher, Vice President and
Director of Family Economic Security
National Women's Law Center

Cristina Martin Firvida, Senior Counsel
National Women's Law Center

Leora Gershenzon, Staff Attorney
National Center for Youth Law

Geraldine Jensen, President
Association for Children for
Enforcement of Support (ACES)

Earl Johnson, Research Associate
Manpower Demonstration Research Corporation

Joseph Jones, Director
Center for Fathers, Families and Workforce
Development — Baltimore, MD

Vicky Kimbrell, Family and Health Law
Specialist Attorney
Georgia Legal Services

David Pate, Executive Director
Center on Fathers, Families and Public Policy

Jessica Pearson, Executive Director
Center for Policy Research

Wendy Pollack, Staff Attorney
National Center on Poverty Law

Wendell Primus, Director of Income Security
Center on Budget and Policy Priorities

Edwin Ridgway, Director of Site Development
National Center for Strategic Nonprofit Planning and
Community Leadership

Paula Roberts, Senior Staff Attorney
Center for Law and Social Policy

Geraldo Rodriguez, Program Manager
Parents Fair Share — Los Angeles, CA

Marguerite Roulet, Research Associate
Center on Fathers, Families, and Public Policy

Elaine Sorensen, Research Associate
Urban Institute

Jerry Tello, Director
National Latino Fatherhood and Family Institute

Bobby Verdugo, Staff
National Latino Fatherhood and Family Institute

Professor Constance Williams,
Director of the Ph.D. Program,
Heller Graduate School for Advanced Studies in
Social Welfare, Brandeis University

Oliver Williams, Director
National Institute on Domestic Violence in the
African American Community

**Affiliations listed as of the date of the meetings*

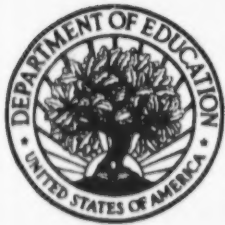


National Women's Law Center
11 Dupont Circle, Suite 800
Washington, DC 20036
Tel 202.588.5180
Fax 202.588.5185
Web www.nwlc.org



FFPP Center on Fathers, Families, and Public Policy

Center on Families, Families, and Public Policy
23 North Pinckney Street, Suite 210
Madison, WI 53703
Tel 608.257.3118
Fax 608.257.1686
Web www.cffpp.org



*U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)*



NOTICE

Reproduction Basis

X

This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.



This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").